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No. 99-___

In The

Supreme Court of the United States

LOUISE ROBICHAUD SAMAROO,

Petitioner,

v.

AT&T MANAGEMENT PENSION PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

LOUISE ROBICHAUD SAMAROO, ESQUIRE
4585 Route 27
Post Office Box 166
Kingston, NJ 08528
(609) 924-9699

Petitioner Pro Se

174PP

QUESTION PRESENTED FOR REVIEW

Did the Third Circuit majority err by failing to give full faith and credit to the *nunc pro tunc* nature of a New Jersey state court domestic relations order awarding the wife 50% of the husband's survivor annuity?

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STATEMENT OF PRIOR OPINIONS

The District Court's decision in this case, *AT&T Management Pension Plan v. Robichaud*, Civ. No. 89-2215 (GEB) (D.N.J. Apr. 21, 1998), is set forth in the appendix at A-45. An earlier District Court opinion, addressing a jurisdictional issue not presented here, is set forth in the appendix at A-24, and published at 743 F. Supp. 309 (D.N.J. 1990). The Third Circuit's review of that decision, *AT&T Management Pension Plan v. Robichaud*, No. 98-5245 (future publication expected at 193 F.3d 185) (3d Cir. Sept. 24, 1999) is set forth in the appendix at A-1.

STATEMENT OF JURISDICTION

1. The decision sought to be reviewed was entered by the Third Circuit Court of Appeals on September 24, 1999.

2. There has been no order respecting rehearing, and no order granting an extension of time to file a petition for writ of certiorari.

3. This is not a cross-petition for a writ of certiorari.

4. Jurisdiction over this petition is conferred by 28 U.S.C. § 1254(1).

5. This case does not require notifications under Sup. Ct. R. 29.4(b) or (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Full Faith and Credit Clause, U.S. Const. art. IV, § 1, provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit Act, 28 U.S.C. § 1738, provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The qualified domestic relations order provisions of ERISA, 29 U.S.C. § 1056(d), provide:

> **(d) Assignment or alienation of plan benefits**
>
> **(1)** Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
>
> . . . .
>
> **(3)(A)** Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.
>
> **(B)** For purposes of this paragraph –

(i) the term "qualified domestic relations order" means a domestic relations order –

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which –

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

STATEMENT OF THE CASE

1. Nature of the Proceedings

This action began in 1989 as a post divorce motion filed in a New Jersey state court divorce case by the wife, Louise M. Robichaud, against the estate of her deceased husband, Winston R. Samaroo. The motion sought to modify on grounds of equity and mutual mistake a divorce decree entered by the same court in 1984 (A-69). The divorce decree incorporated but did not merge a 1983 separation agreement (A-69). The agreement provided that the wife would receive half of the monthly amount paid to the husband under his vested pension plan. The wife sought to modify the decree to provide that she would receive, in addition, half of the husband's survivor annuity. She alleged that the parties had intended this result, and that they had failed to so state in the agreement because of a mutual mistake.

The wife joined as parties to her motion not only her husband's estate, but also the administrator of the husband's pension plan, AT&T Management Pension Plan ("AT&T"). The estate did not object to the motion. AT&T removed the wife's petition to District Court under 28 U.S.C. § 1441. Simultaneously, it filed an original declaratory judgment action in District Court under 28 U.S.C. §§ 1132 and 1331, seeking the same relief. AT&T's actions

were based upon its contention that enforcement of the judgment sought by the wife was barred by the Employee Retirement Income Security Act (ERISA). Upon the wife's jurisdictional objection, the District Court remanded the state court action back to New Jersey state court for resolution of state law domestic relations issues, while retaining jurisdiction over the ERISA issues. *Samaroo v. Samaroo*, 743 F. Supp. 309 (D.N.J. 1990).

The state court issued a final judgment in 1996, accepting the wife's mutual mistake argument. *Samaroo v. Samaroo*, No. FM-18-000454-96 (N.J. Super. Ct. Ch. Div. June 28, 1996) (A-120). In accordance with that argument, the court modified the agreement and divorce decree to award the wife 50% of the husband's survivor annuity, *nunc pro tunc* to 1984, prior to the husband's death. This decision was not appealed, and it became binding upon all parties.

AT&T then filed a motion for summary judgment in District Court in both the original and removed actions, renewing its contention that ERISA prevented enforcement of the state court order. The District Court granted that motion. *AT&T Management Pension Plan v. Robichaud*, Civ. No. 89-2215 (GEB), (D.N.J. Apr. 21, 1998) (A-45).

The wife filed a timely notice of appeal to the Third Circuit Court of Appeals on May 13, 1998. On September 24, 1999, that court affirmed the District Court decision by a 2-1 margin. *AT&T Management Pension Plan v. Robichaud*, No. 98-5245 (3d Cir. Sept. 24, 1999) (future publication expected at 193 F.3d 185) (A-1). The wife requests leave to appeal from the Third Circuit's decision.

2. Statement of Facts

Except for an acturial conclusion of the Third Circuit majority, the relevant facts in this action are mostly undisputed. Winston Samaroo and Louise Robichaud were divorced on October 25, 1984. The divorce decree

incorporated but did not merge a separation agreement signed by the parties in 1983. The agreement provided:

> Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 dollars per month. At the time of husband's retirement and receipt of his pension he agrees to pay wife one half of said monthly amount.

(A-76.) The agreement did not mention the husband's survivor benefits. The divorce decree did not recite any of the provisions of the agreement, instead merely ordering "that the parties faithfully abide by the terms of an Agreement between them dated March 30, 1983" (A-69).

The husband died on September 20, 1987 while employed. He worked for AT&T since 8/13/65. At the time of his death, the AT&T Retirement Plan provided that his surviving spouse would receive a lifetime annuity. Since he had no surviving spouse at the time of his death, AT&T initially took the position that no annuity was payable. The wife believed, however, that the intention of the parties in drafting the agreement was to divide equally all of the benefits due to the husband from AT&T. They failed to mention the survivor annuity, she believed, only because of a mutual mistake. The husband's divorce attorney joined in the wife's request.

Pursuant to her belief, the wife filed a motion in her divorce case, seeking to modify the agreement and divorce decree retroactively to correct the mutual mistake. The state court decided the motion under the substantive domestic relations law of New Jersey, a subject far outside the jurisdiction of any federal court. Under that law, "[b]ecause such interspousal agreements are enforceable only in equity, they are subject to 'the court's power to exercise continued supervisory control.' " *Edgerton v. Edgerton*, 203 N.J. Super. 160, 496 A.2d 366, 371 (App. Div. 1985) (quoting *Smith v. Smith*, 72 N.J. 350, 371 A.2d 1, 5 (1977); *see also Regan v. Regan*, 246 N.J. Super. 473, 587 A.2d 1330, 1332 (Ch. Div. 1990). Applying this

unique standard of review, the court held that the divorce decree could be reformed to reflect the parties' true intention to make an equal division of all of the benefits available under their respective retirement plans. *Samaroo v. Samaroo*, No. FM-18-000454-96 (N.J. Super. Ct. Ch. Div. June 28, 1996) (A-118). In particular, the court ordered that the wife receive 50% of the husband's surviving spouse annuity. Because the order was a clarification of the parties intent in the agreement and decree, the court expressly ordered that its order apply *nunc pro tunc* from the date of the original divorce decree (A-111).

The question at issue here, simply and succinctly put, is whether enforcement of the New Jersey modification order is barred by ERISA.

ARGUMENT

1. INTRODUCTION

A valid New Jersey state court order provides that the wife shall receive 50% of the husband's surviving spouse annuity. *Samaroo v. Samaroo*, No. FM-18-000454-96 (N.J. Super. Ct. Ch. Div. June 28, 1996) (A-120, A-122). That order is final, and binding upon all of the parties, as far as state law is concerned. The only question here is whether ERISA prevents enforcement of that order.

The District Court opinion and both Third Circuit opinions agree that a New Jersey state court order, entered during the husband's lifetime, could have awarded the wife 50% of his survivor annuity. The District Court and the Third Circuit majority nevertheless held that such an order could not be entered after the husband's death, because its effect would be to revive an already-terminated liability of the husband's pension plan. The Third Circuit dissent argued, and a District Court case from the Seventh Circuit holds on similar facts, that a terminated liability was not revived. Under the Full Faith and Credit Act, 28 U.S.C. § 1738, the federal

courts must give the New Jersey order the same effect it has in New Jersey, and, under New Jersey law, *the state court order is a nunc pro tunc decree which has full retroactive effect*. Thus, in legal effect the order *was* entered during the husband's lifetime, and it merely reallocated an existing unterminated liability from one spouse to the other.

By refusing to recognize the retroactive nature of the New Jersey order, the courts below committed a fundamental violation of the Full Faith and Credit Act. Moreover, the majority opinion below creates a very real risk of a substantial increase in attempts to litigate core domestic relations issues in federal courts. The wife requests that this court accept her appeal, resolve the split in authority between the Third and Seventh Circuits, and reverse the Third Circuit majority opinion.

2. DEFINING THE ISSUE

ERISA expressly states the condition under which it does and does not prevent enforcement of state court judgments dividing benefits under regulated retirement plans. Under 29 U.S.C. § 1056(d)(3)(A), the general rule is that ERISA's provision against alienation of benefits, § 1056(d)(1), applies to state court judgments dividing retirement benefits. The anti-alienation provision does not apply, however, and there is no preemption, when the judgment dividing benefits constitutes a "qualified domestic relations order" (QDRO). *Id.* § 1056(d)(3)(A). The question at issue here can therefore be further refined as whether the New Jersey state court order awarding the wife 50% of the husband's surviving spouse annuity constitutes a QDRO.

The definition of a QDRO is set forth in 29 U.S.C. § 1056(d)(3)(B). To begin with, in order to constitute a QDRO, an order must first be a domestic relations order. 29 U.S.C. § 1056(d)(3)(B)(i),(ii). A domestic relations order is an order granting property or support rights under state domestic relations law. 29 U.S.C. § 1056(d)(3)(B)(ii).

It is uncontested that the order at issue here constitutes a domestic relations order.

A domestic relations order constitutes a QDRO only if three additional requirements are met. These three requirements are as follows:

1. The order must be one which "creates or recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits" payable to the owner. 29 U.S.C. § 1056(d)(3)(B)(i). The present order clearly creates a right in the wife to receive 50% of the husband's surviving spouse annuity, a benefit payable under the terms of the plan.

2. The order must specify the name and last known mailing address of each participant and each alternate payee; the amount or percentage to be received by each alternate payee (or the manner in which the amount or percentage should be determined); the number of payments or periods for which the order is effective; and the precise retirement plan or plans to which the order applies. 29 U.S.C. § 1056(d)(3)(C). The District Court held that the present order is in substantial compliance with these requirements. *AT&T Management Pension Plan v. Robichaud*, Civ. No. 89-2215 (GEB) at 6-7 (D.N.J. Apr. 21, 1998) (A-52 to A-53). AT&T did not appeal from that decision.

3. The order may not "require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan," may not "require the plan to provide increased benefits (determined on the basis of actuarial value)," and may not require the plan to pay to one alternate payee benefits already payable to another. 29 U.S.C. § 1056(d)(3)(D). This requirement is the focus of the present case. The order requires payment of a surviving spouse annuity, a benefit which is already provided under the plan, and there are no competing QDROs.

AT&T contends, however, that the order requires payment of increased benefits, thereby violating 29 U.S.C. § 1056(d)(3)(D)(ii).

Of the three requirements discussed above, the first two are clearly met. Moreover, the first and third subparts of the third requirement are clearly met. The most narrow and precise definition of the contested issue in this case is therefore the following: *Does the New Jersey court order require AT&T to pay the wife "increased benefits (determined on the basis of actuarial value"*? If so, the order is not a QDRO, and enforcement is barred by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1). If not, then the order does constitute a QDRO, the anti-alienation provision does not apply, and federal law does not prevent enforcement of the order.

3. THE THIRD CIRCUIT MAJORITY OPINION

The Third Circuit majority began its opinion by noting that the purpose of 29 U.S.C. § 1056(d)(3)(D) is to prevent state courts from imposing additional liabilities upon pension plans. Successful operation of any plan necessarily requires the plan administrator to foresee future liabilities and plan funding to meet them, and the funding process will be impossible if state courts are free to impose new liabilities upon the plan. "A domestic decree that would have the effect of increasing the liability of the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO[.]" *AT&T Management Pension Plan v. Robichaud*, No. 98-5245 [hereinafter Third Circuit Majority Opinion] at 8 (3d Cir. Sept. 24, 1999) (A-10). Stated differently, the purpose of a QDRO is to reallocate existing liabilities of the plan to a different creditor, and not to impose additional new liabilities upon it.

The Third Circuit then found that the state court order improperly imposed a new liability upon the plan. The majority held that when the husband died without

leaving any surviving spouse the plan's potential liability for a survivor spouse annuity terminated. When the state court order then purported to revive that annuity after the husband's death, the majority held that an entirely new liability was improperly created. Life insurance is an actuarial game of chance, the court held, and "[a]llowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan." *Id.* at 9 (A-12).

4. THE THIRD CIRCUIT DISSENT

The dissenting opinion took issue with the majority's unsupported assumption that the wife was "attempting to change the operative facts after [s]he had lost the gamble." *Id.* Under New Jersey state law, the dissent pointed out, the state court made a *nunc pro tunc* order which was retroactive back to the date of divorce. The state court did not issue a new order; it retroactively corrected an error in the existing agreement and decree. It is absolutely clear under the law of New Jersey that an order correcting a mutual mistake in a past agreement or decree may be given retroactive effect. "The omission in the order was an oversight. It may be corrected by the entry of an order nunc pro tunc[.]" *Atwater v. Baskerville*, 89 N.J. Eq. 121, 104 A. 310 (Ch. 1918), *aff'd*, 90 N.J. Eq. 275, 106 A. 369 (E. & A. 1919). Indeed, New Jersey has expressly held that a domestic relations order may be granted *nunc pro tunc* as of a date before one party's death. *Fulton v. Fulton*, 204 N.J. Super. 544, 499 A.2d 542 (Ch. Div. 1985). It is further clear, under unquestioned principles of full faith and credit, that the federal courts *must* give the New Jersey order exactly the same effect it has in New Jersey. *E.g., Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996); *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932). Thus, as a fundamental matter of full faith and credit, the dissent found that the court was

bound to give full retroactive effect to the New Jersey decree.

This point of full faith and credit law necessarily disposed of the entire case. The majority and dissent both agreed that the original divorce decree could have required AT&T to pay the husband's surviving spouse annuity to the wife. *See* Third Circuit Majority Opinion at 10 (A-12) (state court "could have entered a QDRO conveying the rights to Robichaud"); *AT&T Management Pension Plan v. Robichaud*, No. 98-5245 (Mansmann, J., dissenting) [hereinafter Third Circuit Dissenting Opinion] at 12 n.2 (3d Cir. Sept. 24, 1999) (A-15) ("There appears to be no dispute that if the order had actually been entered on its stated effective date, Ms. Robichaud would be entitled to the survivor's benefit she seeks"). The dissent's entire point, however, was that the federal courts are bound to give the state court order the same effect it has under state law – that is, to treat it as effective from the date of the original divorce decree. If the state court order is fully retroactive, then that order did not impose a new liability upon the plan. Instead, it merely reallocated an existing liability, changing the beneficiary from a hypothetical future new wife to the husband's actual former wife. The entire purpose and effect of the QDRO provisions of ERISA, of course, is to permit such reallocation.

The majority did not truly respond to the dissent's invocation of full faith and credit principles. It purported to respond by noting that the effect of the state court order upon the plan is determined under federal law, but that is a basic truism with which all parties agree. The dissent's point was that the Full Faith and Credit Act requires the federal courts to respect the retroactivity of the state court order. Mere invocation of the Supremacy Clause does not justify a decision to prefer one federal law (ERISA) over another (the Full Faith and Credit Act). The majority obviously believed that it was free to apply

federal ERISA law and to disregard federal full faith and credit law, but it never stated any reasoning to support this conclusion.

5. DECISIONS FROM OTHER COURTS

The opinions below cited prior decisions on this issue from the Fourth and Seventh Circuits, and from the state courts of New Jersey. The Seventh Circuit decision is squarely on point, and it reaches a result contrary to the Third Circuit majority. The remaining decisions are all distinguishable, and therefore not relevant.

The decision from the Seventh Circuit is *Payne v. GM/UAW Pension Plan*, No. 95-CV-73554DT, 1996 WL 943424 (E.D. Mich. May 7, 1996) (A-130). In *Payne*, a Michigan state court ordered that the wife receive 45% of the husband's "pension." 1996 WL 943424 at *1. The order expressly stated that the wife was *not* the husband's surviving spouse for survivor benefit purposes. The husband died, and the wife returned to state court, obtaining a second order *nunc pro tunc* granting her "full survivorship benefits" and naming her as surviving spouse. *Id.* at *2. The plan administrator argued that the second order was not a QDRO, but the court disagreed. The order did not require payment of a benefit not available under the terms of the plan, as the plan did provide for survivor benefits. "[T]he amended QDRO was entered nunc pro tunc to a date prior to [the husband's] death. Thus, the designation was not made after death." *Id.* at *7. The district court expressly held that it was required to give full faith and credit to all provisions of the state court order, including both its substantive effect and its *nunc pro tunc* effective date. The wife therefore received full survivor benefits.

The Third Circuit majority conceded that *Payne* is exactly on point, but directly criticized its holding. According to the majority, *Payne* awarded the wife "benefits that she had not been able to obtain through the

divorce negotiations." Third Circuit Majority Opinion at 11. This comment shows a remarkable failure to understand the *Payne* court's reasoning. *Payne* held that the wife *had* obtained survivor benefits initially, and that those benefits were omitted from the initial state court order only because that order was unclearly drafted. Likewise, in this case the New Jersey state court accepted the wife's argument that the parties intended all along to divide all of the husband's retirement benefits equally, and that they omitted express reference to the benefits only because of a mutual mistake. In neither case did the order impose any new obligation; both orders only correct errors in prior judgments.

Moreover, and more importantly, *Payne recognized that basic principles of full faith and credit prevented it from looking beneath the surface of the state court judgment.* Whether or not the wife had obtained survivor benefits in the initial divorce negotiations was a question of state domestic relations law, far removed from both the competence and the jurisdiction of any federal judge. It was not the task of the court in *Payne*, and it is not the task of any federal court in this case, to determine whether the state court order was correctly rendered. That subject has already been decided by the state courts of New Jersey. The Third Circuit majority's criticism of *Payne* is a direct violation of full faith and credit principles.

Except for its attempt to second-guess the final state court judgment in *Payne*, the majority did not state a single reason for failing to follow *Payne*'s holding. The wife submits that in *Payne*, as in this case, the federal courts are bound by the *nunc pro tunc* nature of the state court judgment.

The remaining cases cited by the Third Circuit majority are *Hopkins v. AT&T Global Information Solutions*, 105 F.3d 153 (4th Cir. 1997), and *Ross v. Ross*, 705 A.2d 784 (N.J. Super. Ct. App. Div. 1998). Both of these cases are clearly distinguishable from the present case. In each

case, *after the husband had remarried and died*, the wife sought to obtain a surviving spouse annuity. Because the husband in each case was married at the time of his death, the surviving spouse annuity immediately vested in a person other than the former wife. On the facts of this case, the husband had not remarried at the time of his death. Thus, the survivor benefits have not vested in any innocent third party.

Moreover, neither *Hopkins* nor *Ross* involved a *nunc pro tunc* state court order. In *Hopkins*, the state court order was a new order garnishing survivor benefits for nonpayment of alimony. This order clearly created a new obligation which did not have any retroactive effect. In *Ross*, no court order was entered at all before the decedent died, so there was nothing for the state court order to relate back to. In both this case and *Payne*, by contrast, the state court order was expressly stated as a *nunc pro tunc* correction of an error in a prior order. The *nunc pro tunc* nature of the present order raises important full faith and credit issues which were simply not present in either *Hopkins* or *Ross*.

6. THE WIFE'S CLAIM OF ERROR

The wife contends that the Third Circuit's decision is in error for precisely the reason identified by the dissent. The majority admitted that before the husband's death the New Jersey state court "could have entered a QDRO conveying the [survivor annuity] rights to Robichaud." Third Circuit Majority Opinion at 10. *This is the course of events which effectively occurred.* The state court order was expressly made *nunc pro tunc*. "Nunc pro tunc signifies now for then, or, in other words, a thing is done now, *which shall have the same legal force and effect as if done at [the] time when it ought to have been done.*" Black's Law Dictionary 1069 (6th ed. 1990). The federal courts are bound to respect final state court judgments including the

retroactivity of the New Jersey order. While ERISA supercedes contrary state law, it does not *and cannot* supercede federal full faith and credit law. Because the wife's status as the surviving spouse of the husband is retroactive to the date of the original divorce decree, the husband *did* have a surviving spouse when he died. Thus, at the moment of the husband's death, his survivor annuity vested in the wife and did not lapse.

The obligation of federal courts to give full faith and credit to state court judgments is well settled. "The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal courts." *American Surety Co.*, 287 U.S. at 166 (citing U.S. Const. art. 4, § 1, and present 28 U.S.C. § 1738). "A federal court sitting in New Hampshire is bound equally with the courts of the state to observe the command of the full faith and credit clause[.]" *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 155 (1932).

Federal courts applying principles of full faith and credit have expressly held that they must respect the *nunc pro tunc* nature of a state court judgment. A question quite similar to the present case arose in *Flitcroft v. Commissioner*, 328 F.2d 449 (9th Cir. 1964). *Flitcroft* involved the amount of income tax due on certain trusts established by the taxpayers. If the trusts were irrevocable, then the income of the trusts was not income to the taxpayers, and no tax was due. Conversely, if the trusts were revocable, then the income of the trusts was taxable to the taxpayers.

Proceedings began when the taxpayers filed a declaratory judgment action in California state court against the trust beneficiaries and state and federal tax authorities, seeking to reform the trust documents to expressly provide that the trusts were irrevocable. The IRS removed the action to federal court, which held that an action to reform a trust instrument was outside the jurisdiction of a

federal court. The federal court remanded the question back to state court. The state court granted a decree reforming the trusts, on grounds that the parties had intended them to be irrevocable all along and that the failure of the trust documents to state so expressly was a mutual mistake.

The IRS then questioned the taxpayers' tax returns, arguing that the income of the trusts was taxable to the taxpayers because the trusts were revocable. The IRS accepted the prospective validity of the state court order, but argued that it was a collusive decree which could not be given retroactive effect to reduce outstanding federal tax liability. The Ninth Circuit disagreed:

> The California court has held that it was the intention of the parties to create an irrevocable trust and the failure to do so was the result of a mistake. As was said in Gallagher v. Smith, supra, the adjudication of the state court is given effect, "not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed."

Id. at 459 (quoting *Gallagher v. Smith*, 223 F.2d 218, 223 (3d Cir. 1955)). The court held that it was required to recognize the retroactive, *nunc pro tunc* nature of a state court order correcting a mutual mistake.

There are many similarities between *Flitcroft* and this case. Just as state law is conclusive of the property rights of federal taxpayers, so is state law conclusive as to the substantive rights of one spouse to share in the other's retirement benefits. Just as the California court was allowed to correct retroactively the failure of the trust instruments to state expressly that they were irrevocable, so was the New Jersey court in this case permitted to correct the parties' earlier failure to state their intention to divide equally the husband's surviving spouse annuity. Both issues are questions of state law alone. Moreover, *Flitcroft* expressly held that the state court decision was

binding *regardless* of res judicata concerns, as federal tax law gives the IRS no interest in the revocability or irrevocability of a particular trust. Likewise, AT&T has no present interest in whether the parties here did or did not intend to divide the husband's survivor annuity. This is true not only because ERISA defers to state law, but also because the state law involved is the law of domestic relations. "Federal courts lack power to issue [domestic relations orders] because of the special proficiency developed by state tribunals over the past century and a half handling issues that arise in the granting of such decrees." *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992). "The whole subject of domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1980)). Because of the limited federal jurisdiction over domestic relations, it was particularly necessary for AT&T to raise any claims of substantive error in a state court appeal – a step which it unaccountably failed to take. The state court judgment here, like the judgment in *Flitcroft*, is conclusive for all purposes in federal court.

Along similar lines, in *United States v. Hennen*, 300 F. Supp. 256 (D. Nev. 1952), a Nevada state court entered an order determining the rights of certain claimants to use waters from Pahranagat Lake. One of the claimants subsequently conveyed his rights to the United States. After the conveyance, a majority of the claimants filed in state court a motion seeking *nunc pro tunc* correction of an error in the prior order. The state trial court denied the motion, but the state supreme court reversed, ordering that the error be corrected retroactively. Instead of appealing the state supreme court's decision to this Court, the United States filed an action in federal district court seeking to have the state court judgment declared void. The court refused to grant the relief requested. The question at issue had been presented to, and duly

decided by, the state courts of Nevada. The United States had full opportunity to appear in that action, and to appeal the final decision to this Court. When it failed to do so, the decision of the state supreme court became binding for purposes of all federal litigation. "The complaint by the Government in this action constitutes a collateral attack on the State Court proceedings." *Id.* at 264.

Hennen, like *Flitcroft*, is contrary to the Third Circuit majority opinion. The New Jersey court in this case, like the Nevada court in *Hennen*, had unquestioned jurisdiction to issue the original decree. The power to make a judgment necessarily implies the power to correct subsequent errors in that judgment, retroactive to its date of issuance. AT&T's complaint, like the complaint of the United States in *Hennen*, is an impermissible collateral attack upon a final state court judgment.

7. AT&T'S CONTRARY ARGUMENTS

AT&T argued at length in its brief to the Third Circuit that the state court's decision was not binding. Significantly, the Third Circuit did not expressly accept any of these arguments. The only stated reason for ignoring the *nunc pro tunc* nature of the state court order was the supremacy of federal law – a statement which provides no basis for failing to follow *federal* full faith and credit law.

In addition, AT&T's contentions were entirely mistaken. It cited voluminous authority holding that federal courts must look to law from the appellate courts of New Jersey, or to current New Jersey law, law which it argued was contrary to the New Jersey decision at issue. These cases, however, were all from federal courts applying state decisions as legal precedent in a *different case*. *E.g.*, *Estate of Meriano v. Commissioner*, 142 F.3d 651 (3d Cir. 1998). Here, the state court decision was rendered in the exact *same case* as the one under consideration. Since the

earliest days of our nation's history, federal law has clearly provided that federal courts *must* give binding effect to state court decisions rendered in the same case. 28 U.S.C. § 1738; *see, e.g., American Surety Co.*, 287 U.S. at 166.

Moreover, AT&T ignores entirely the fact that the state court resolved the state law issues pursuant to an express remand order from the district court. *Samaroo v. Samaroo*, 743 F. Supp. 309 (D.N.J. 1990). When a federal court remands state law issues to a state court for determination, *all parties to the federal action are necessarily bound by the resulting state court order.* If the ultimate authority for deciding questions of state law in this case was the federal district court, that court would have decided those issues itself rather than remanding them back to state court. Under AT&T's argument, the entire remand order was a useless and indeed absurd action. If AT&T's point is that the remand order was legally wrong, its remedy was to appeal that order, not to attack it collaterally at a later date. The remand order necessarily established that the state court's resolution of the state law issues would be binding upon everyone.

Further, regardless of res judicata, ERISA gives the federal courts no subject-matter jurisdiction to second-guess state courts on issues of domestic relations law:

> ERISA does not require, or even permit, a pension fund to look beneath the surface of the [state court] order. Compliance with a QDRO is mandatory.
>
> ERISA's allocation of functions – in which state courts apply state law to the facts, and pension plans determine whether the resulting orders adequately identify the payee and fall within the limits of benefits available under the plan – is eminently sensible. Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second-

> guessing state judges' decisions would be repellent. Unsuccessful litigants would refile their briefs from the state litigation with pension administrators, in the hope that lightning may strike as laymen review the work of judges. Far better to let the states' appellate courts take care of legal errors by trial judges.

Blue v. UAL Corp., 160 F.3d 383, 386 (7th Cir. 1998). To these points the wife would add the obvious danger of federal courts being snowed under with requests to second-guess state judges' application of state domestic relations law. AT&T's attempt to question the legal soundness of the New Jersey decision not only violates the doctrine of res judicata, but also seeks relief in excess of the limited subject-matter jurisdiction of federal courts.

AT&T also made the remarkable claim that the state court somehow expected the federal court to determine issues of state law. The state judge did indeed recognize that the *effect* of his *nunc pro tunc* order upon AT&T was an issue for the federal court. His decision to render his order *nunc pro tunc*, however, is an issue of state law which cannot be questioned at this time. Moreover, while the effect of the *nunc pro tunc* status is an issue of federal law, federal law is very clear that state court decisions have *exactly* the same effect in federal court that they have in the rendering state. 28 U.S.C. § 1738. Because the state court judgment is clearly retroactive in New Jersey, it is also retroactive in federal court.

AT&T further sought to confuse the issue by arguing that it did not have an effective opportunity to litigate in state court. Whether the opportunity to litigate existed, and whether the parties were identical, are relevant concerns in applying the law of res judicata. In this case, however, the state court judgment is binding regardless of res judicata concerns. "[T]he adjudication of the state court is given effect, 'not because it is res judicata against the United States, but because it is conclusive of the parties' property rights which alone are to be taxed.' "

Flitcroft, 328 F.2d at 459 (quoting *Gallagher*, 223 F.2d at 223). Just as federal tax law requires deference to state court property law decisions, *even those to which the IRS is not a party*, so does ERISA require plan administrators to implement and not question state court orders.

AT&T participated as a full party in the state court action. It filed a formal motion to intervene, which the state court granted in a written order (A-86). At the state court trial, AT&T was given rights of discovery, was represented by counsel, who actually cross-examined witnesses and argued orally (A-90 et seq.). The state court admittedly held that AT&T had no standing to question whether the original divorce decree was or was not the product of a mutual mistake. *But AT&T participated fully in that decision.* Its counsel argued at great length that AT&T did have standing (A-100 et seq.). The fact that AT&T ultimately lost in state court on the standing issue does not mean that AT&T did not have a fair opportunity to litigate that question. AT&T had a fair opportunity to litigate the question of standing, and it actually did litigate the question of standing.

When a question of law is actually litigated before a court, the resulting decision is binding upon all of the litigants. This is true even where the question litigated involves subject-matter jurisdiction. *See, e.g., Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Corp.*, 455 U.S. 691 (1982); *Durfee v. Duke*, 375 U.S. 106 (1963). Thus, the state court's decision on standing is binding upon AT&T. *AT&T cannot be permitted to accept an adverse state judgment and then seek relief by a collateral attack upon that judgment in federal court.*

AT&T further argues that the state court proceedings were collusive. If this was true, AT&T's remedy was to seek standing in the state court action, and to appeal if standing were denied. AT&T did not, however, appeal

the state court action. It thereby lost its chance to raise a defense of collusion.

A similar result was reached in *Flitcroft*. There, an attempt by the IRS to argue collusion was likewise rejected. The court held that the state court proceedings at issue there were not collusive, "particularly in view of the fact that the [IRS] had full knowledge of the state court proceedings, having been joined initially as a party in that action." 328 F.2d at 459. In other words, the IRS knew of the state court proceedings, and it had the full ability to protect its interests in those proceedings, appealing if necessary any adverse judgments to a higher state court. AT&T likewise had the full *opportunity* to participate in the state court proceedings and in fact *did* participate fully. To the extent that opportunity did not translate into results, that failure is the result of AT&T's voluntary decision not to appeal state court orders entered adversely to its interests. *The federal courts cannot be used as a substitute for appeals to state courts on matters of state law.* Any claim of collusion by AT&T should have been made in state court, and it cannot be made here.

Finally, AT&T argued, and the Third Circuit majority found, that acceptance of the wife's position would do actuarial damage to the plan. Neither the Third Circuit nor AT&T explains why there should be an actuarial damage exception to the rule requiring federal courts to give full faith and credit to state court judgments. To the extent that AT&T believes that ERISA enshrines actuarial soundness above all other virtues, the answer is that this case is not controlled by ERISA, but rather by full faith and credit principles which have been applied in federal court since the very foundation of this country. 28 U.S.C. § 1738.

Moreover, under the terms of the plan, the husband's surviving spouse was entitled to an annuity. From the administrator's viewpoint, it was possible at any point that the husband might remarry, thereby triggering the

annuity provisions. It was also possible at any moment that the wife might obtain a QDRO during the husband's lifetime, a situation in which AT&T admits that the annuity would have been payable to the wife. Indeed, it was even possible that a QDRO obtained during the husband's lifetime might have been served on AT&T after the husband's death. In all of these situations, AT&T would have been required to fund an annuity.

To require funding of an annuity in the present situation, where a pre-death divorce decree fails because of mutual mistake to include an express reference to the survivor annuity, does not impose a materially greater burden. It is important to note that state courts grant relief on grounds of mutual mistake only rarely, and only where the evidence clearly supports the position that a mistake was made. *See also* Third Circuit Dissenting Opinion at 16 (A-20) ("[T]he Plan does not allege that it reduced funding levels or otherwise changed its position in reliance on a belief that it would not have to pay a surviving spouse benefit").

Finally, at a very minimum, the question of actuarial soundness posed questions of fact. The present case, however, was resolved in a grant of summary judgment (A-67). The Third Circuit majority's finding that the state court order inflicted actuarial damage upon the plan was an improper attempt to resolve a contested question of fact without holding an evidentary hearing.

8. THE IMPORTANCE OF RETROACTIVE AMENDMENT

The wife's position finds strong support in the policies underlying the QDRO exception to the general rule against alienation of ERISA-regulated benefits. The purpose of that exception was to recognize the right of state courts to divide retirement benefits of all sorts between divorcing parties. Marriage is a economic partnership,

and state courts agree that in the event of divorce property acquired during the marriage should be divided equitably between the spouses, without regard to legal title. While this theory originated in community property jurisdictions, it has now been adopted uniformly in common-law property jurisdictions as well. "As of 1994, every American jurisdiction treats vested retirement benefits as property" divisible upon divorce. Brett R. Turner, *Equitable Distribution of Property* § 6.09 at 331 (2d ed. 1994). The purpose of the QDRO provisions was to require federal courts and plan administrators to recognize the authority of state courts to divide retirement and survivor benefits. "The object of [the QDRO provisions] was to better protect women who had contributed to their marriage's financial security through their work in the home, anticipated sharing in the pension income received upon their husband's retirement, but were left inescapably dependent upon their husband's earnings, at the mercy of death or divorce." *Kahn v. Kahn*, 801 F. Supp. 1237, 1244 (S.D.N.Y. 1992), *aff'd mem.*, 2 F.3d 403 (2d Cir. 1993) (citing *Pension Equity for Women: Hearings on H.R. 2100 Before the Subcomm. on Labor-Mgnt. Relations of the Comm. on Education & Labor*, 98th Cong., 1st Sess. 26 (1983)).

The Third Circuit opinion materially hinders achievement of the above purpose. The QDRO provisions recognize two major limitations upon enforcement of state court orders: The orders must meet certain requirements of form, 29 U.S.C. § 1056(d)(3)(C), and they must reallocate existing liabilities of the plan, rather than create new ones. 29 U.S.C. § 1056(d)(3)(D). The effect of the second limitation is to require that the order "speak the language" of the pension plan. Because provisions of pension plans vary greatly from one plan to the next, the wording necessary to meet the requirements of § 1056(d)(3)(D) is highly plan-specific. Language which is sufficient to divide benefits under one plan will not be

sufficient to divide benefits under another. In light of this fact, it is a fairly common occurrence in the real world of pension division that a proposed QDRO will be rejected one or more times by the plan administrator. The language of many QDROs results from a process of submission, rejection, modification, and eventual acceptance.

The result of the Third Circuit decision is to cut that process short. Under that decision, a QDRO cannot be entered after the death of one of the spouses. Thus, if the QDRO does not exist in a final form before death, no further modification and resubmission is needed. In the real world, however, the ability to make retroactive modifications to a state court order is *essential* to the process of drafting language which meets the requirements of the QDRO provisions. To cut this process short upon the death of one spouse is to prevent accomplishment of the statutory purpose in a great number of cases.

The harm done by preventing retroactive modification is particularly acute in the case of survivor annuities. Because effective January 1, 1985 Congress expressly required that plans provide for survivor annuities, 29 U.S.C. § 1055, and that state courts be able to name a former spouse as irrevocable beneficiary of such an annuity, *id.* § 1056(d)(3)(F), it follows that Congress intended to permit state courts to divide survivor benefits. Objections are also unusually likely in cases such as this one, where the original order was drafted *before* the effective date of the QDRO provisions. By preventing retroactive amendment of QDROs dividing survivor benefits after the death of one spouse, the Third Circuit decision interferes materially with Congress's manifest intention to permit *effective* division of survivor benefits by state courts. The clear intent of Congress is to protect former spouses. Nowhere does Congress indicate that survivor rights should terminate upon the death of a participant pre-retirement.

The wife realizes then even under the Third Circuit decision division of survivor benefits is possible if the state court uses the correct language in the first draft of the order. To require correct language in the first draft of an order is to impose an unreasonable drafting requirement. QDROs, by their nature, are drafted by state courts and domestic relations attorneys who are not pension plan specialists. Even where a pension plan specialist drafts a QDRO, the terms of pension plans vary so greatly that past expertise is of limited utility. The QDRO provisions generally recognize this fact by requiring the plan administrator to provide prompt written notice when an order is rejected, so that the problems raised by the administrator can be corrected. 29 U.S.C. § 1056(d)(3)(G). The importance of *retroactive* correction is inherent in § 1056(d)(3)(H), which requires the administrator to segregate the alternate payee's share of plan benefits while review of a QDRO is in progress.

By preventing retroactive amendment after death, the Third Circuit majority opinion interferes materially with the process of amendment and resubmission, a process which Congress found to be essential to the successful drafting of QDROs. To insure effective implementation of Congress's intent to allow state court division of retirement and survivor benefits, this court should reverse the Third Circuit's opinion.

9. WHY THE COURT SHOULD HEAR THIS APPEAL

The federal district court in this case remanded to the state court the question of whether the divorce decree should be retroactively modified. Necessarily, the remand order held that the decision of the state court would be binding upon that issue.

The state court issued an order adverse to AT&T. Under basic principles of law dating back to the very founding of our nation, the correctness of that state court

order was a question of state law, to be decided exclusively by the state courts. Instead of filing a state court appeal, however, AT&T asked a federal district court to disregard the retroactive effect of the state court order. The dissenting opinion in the Third Circuit, and the Seventh Circuit decision in *Payne*, recognize that federal courts are bound to give the state court decision exactly the same effect it had under state law. 28 U.S.C. § 1738. Other federal decisions have held under § 1738 that federal courts must respect the *nunc pro tunc* nature of a state court order. The Third Circuit majority held to the contrary, turning its back without explanation upon years of practice under the Full Faith and Credit Act.

AT&T's actions and the Third Circuit decision threaten to expose the federal courts to an explosion of domestic relations litigation. If federal courts reviewing a domestic relations order under the QDRO provisions of ERISA are permitted to second-guess state courts on questions of state law, plan administrators will stop raising state law issues in state courts. They will instead raise these objections in federal courts, hoping that the federal court will underestimate the equity-oriented policies which have traditionally prevailed in domestic relations cases. The wife suspects that such underestimation is really what occurred here. The courts below, unfamiliar with the uniquely equitable standard which New Jersey courts apply to postjudgment review of judgments approving separation agreements, felt that the New Jersey courts had not been "strict enough" in ruling upon the wife's motion. It is foreseeable that other federal courts, familiar only with the much stricter standards which apply to review of nondomestic judgments under Fed. R. Civ. P. 60(b), will likewise reach results more favorable to plan administrators than would be reached in state court. The decisions below therefore create a strong incentive for plan administrators to bring issues of domestic relations law before federal courts.

For both jurisdictional and practical reasons, creation of this incentive poses great dangers. The federal courts simply cannot afford any material expansion in their existing case load. Moreover, for traditional reasons with strong constitutional underpinnings, federal courts have almost always referred state domestic relations law issues to state courts. By allowing what is in effect a federal court appeal of a state court judgment, the decisions below exceed the limited jurisdiction of the federal courts over family law issues.

The proper approach in this situation, which was taken by *Payne* and by the dissent in the Third Circuit, is to insist upon strict application of the Full Faith and Credit Act. Under that Act, the state court judgment must be given exactly the same effect in federal court that it has in state court, on every issue, including the question of retroactivity. The result of such strict application is to encourage plan administrators to raise their state law objections in their proper venue, the state appellate courts. That practice not only results in better decisions, but also reduces the workload of the federal courts.

The wife does not deny that ERISA requires the federal court to review whether the state court order impermissibly imposes new obligations upon the plan. In this case, the state court order only reallocates an existing liability, transferring it from the husband's hypothetical future wife to his existing former wife. This transfer did not occur after that liability was extinguished by the husband's death, for when the state court order is given the effect required by the Full Faith and Credit Act, *its effective date is before the husband died.* The Third Circuit majority admitted that the state court could have awarded a surviving spouse annuity to the wife before the husband died, and that is exactly what happened in this case.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Louise Robichaud Samaroo, requests this Court to grant her Petition for Writ of Certiorari.

Respectfully submitted,

LOUISE ROBICHAUD SAMAROO, ESQUIRE

Petitioner Pro Se

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Filed September 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-5245

LOUISE ROBICHAUD SAMAROO,

v.

WINSTON R. SAMAROO,
(D.C. Civil No. 89-2215)

AT&T MANAGEMENT PENSION PLAN,

v.

LOUISE M. ROBICHAUD,
(D.C. Civil No. 89-2216)

Louise M. Robichaud.
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D. C. Civil Nos. 89-2215 and 89-2216)
District Judge: Garrett E. Brown, Jr.

Argued: April 27, 1999

Before: MANSMANN, *Circuit Judge*, and
WEIS and JOHN R. GIBSON, *Senior Circuit Judges.**

(Filed: September 24, 1999)

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* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

Louise M. Robichaud (ARGUED)
Kingston, NJ 08528

Pro Se Appellant

Christopher H. Mills (ARGUED)
Somerset, NJ 08873

Attorney for Appellee

OPINION OF THE COURT

JOHN R. GIBSON, *Senior Circuit Judge.*

Louise Robichaud appeals the district court's[1] entry of summary judgment against her on AT&T Management Pension Plan's complaint for declaratory relief. The Plan sought a declaration that Robichaud was not entitled to pre-retirement survivor's annuity benefits of her former husband, Winston Samaroo, who died while still actively employed by AT&T Technologies. Although the Samaroo-Robichaud divorce decree did not state that Robichaud should receive benefits under Samaroo's pre-retirement survivor's annuity, after Samaroo's death Robichaud obtained a *nunc pro tunc* amendment to the divorce decree purportedly creating such an entitlement. The district court held that the amended order was not a qualified domestic relations order capable of conferring on Robichaud the benefits she seeks. We affirm.

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[1] The Honorable Garrett E. Brown, Jr., United States District Judge for the District of New Jersey.

Robichaud and Samaroo were divorced on October 25, 1984, by the New Jersey Superior Court, Chancery Division. The divorce decree incorporated a property settlement reached by the parties which had the following language concerning Robichaud's rights in Samaroo's pension benefits:

> (d) Pensions, Profit Sharing and Bell System Savings Plan
>
> Savings Plan – (1) Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount.

Neither the decree nor the property settlement mentions any rights to Samaroo's survivor's annuity.

Samaroo died at the age of 53 on September 20, 1987, about three years after the divorce, while still actively employed by AT&T. He was covered under the AT&T Management Pension Plan, a defined benefit plan which provided pensions and survivors' annuities in amounts based on a percentage of the employee's average salary times years of service. Based on Samaroo's age and years of service, he had a vested right to a deferred vested pension, which would have begun, at the earliest, at age 55. Because Samaroo did not live to the age to qualify to receive pension payments, there were, strictly speaking, no pension benefits that ever became payable in respect of Samaroo. Therefore, the benefit expressly mentioned in the divorce settlement agreement never came to fruition.

However, the Plan provides a pre-retirement survivor annuity available to the surviving spouse of any Plan participant who died after vesting but before retiring. If there is no surviving spouse, there is no annuity.

Under the Employee Retirement Income Security Act of 1974 as it existed at the time of the Samaroo-Robichaud divorce, it was unclear whether state divorce decrees could effectively convey a share in one spouse's pension benefits to the other spouse. *See generally Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 610 (5th Cir. 1999); ABA Section of Labor and Employment Law, *Employee Benefits Law* 171-72 (1991). The Retirement Equity Act of 1984, Pub. L. No. 98-397, enacted in August 1984 and effective January 1, 1985, amended ERISA to provide that pension benefits may be alienated by means of a Qualified Domestic Relations Order (known as a QDRO), 29 U.S.C. § 1056(d)(3)(A) (1994). Although the Retirement Equity Act was not in effect on October 25, 1984, the date of the Samaroo-Robichaud divorce, plan administrators may, in their discretion, treat orders entered before the date of the Act as QDROs. S. Rep. No. 98-575, at 23 (1984), *reprinted in* 1984 U.S.S.C.A.N. 2547, 2569.

The Plan denied Robichaud's claim for a pre-retirement survivor's annuity because the divorce decree did not mention any entitlement to such rights, and in the absence of a surviving spouse or a QDRO designating a former spouse as such, there was simply no pre-retirement survivor's annuity payable in respect of

Samaroo.[2] Robichaud filed a motion in the New Jersey Superior Court, Chancery Division, to amend the Final

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[2] Robichaud has chosen to amend the original divorce decree rather than relying on that decree to entitle her to the pre-retirement survivor's annuity; however, she suggests in her reply brief that the original decree could have been read to give her that right. Robichaud tells us the only issue in this case is the validity of the amended order, and therefore we conclude that the adequacy of the original decree is not before us. However, we briefly observe that there are several problems with reading the original decree to convey a survivor's annuity to Robichaud. First, the property settlement apparently only gives Robichaud the right to receive one half of Samaroo's pension payments of $1,358.89 per month, the value of Samaroo's pension rights at the time of the divorce. This shows an intent to divide property rights existing at the time of the divorce, not to give Robichaud an interest in post-divorce earnings. Robichaud now claims half of all benefits payable with respect to Samaroo, including benefits earned after the divorce.

Second, the original decree entitles Robichaud to receive the benefit payments at the time they were paid out to Samaroo, rather than conveying to her a portion of Samaroo's interest in the Plan. Since no benefits became payable to Samaroo himself, the original decree evidently did not convey anything. *See Dugan v. Clinton*, No. 86 C 8492, 1987 WL 11640, at *3-*4 (N.D. Ill. May 22, 1987) (unpublished) (divorce order entitling wife to portion of husband's "monthly pension plan benefit payment" *when received* did not convey interest in pre-retirement survivor annuity); *see generally* Pamela D. Perdue, "Pension and Welfare Benefit Administration QDRO Guidelines, 62 *ALI-ABA Course of Study Materials* 743, 756-57 (1998) (distinguishing between "separate interest" QDROs that divide the actual pension, and "shared payment" QDRO's which merely split the stream of payments and in which "the alternate payee will not receive any payments unless the participant receives payments or is already in pay status").

Third, the original decree was silent on the issue of survivor's rights. Congress has required QDROs to be quite

Judgment of Divorce *nunc pro tunc* to convey to her a right to fifty percent of the preretirement survivor's annuity payable in respect of *Samaroo. Samaroo v. Samaroo,* 743 F. Supp. 309, 311 (D.N.J. 1990). Robichaud joined the Plan as a defendant in the divorce case. *Id.* The Plan removed the action to federal court and also filed a complaint for declaratory relief in the same court. *Id.* The two cases were consolidated. The district court remanded that portion of the removed case that involved the terms of the divorce, but retained jurisdiction of Robichaud's claim against the Plan for the retirement benefits. *Id.* at 317.

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specific in order to convey ERISA benefits. The statute requires a QDRO to state specifically the extent of the alternate payee's interest in the plan, 29 U.S.C. § 1056(d)(3)(C)(ii) and (iii), and states that for purposes of survivor annuities, a former spouse can be treated as a surviving spouse "to the extent provided in any qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(F). In *Roth v. Roth,* 506 N.W.2d 900 (Mich. Ct. App. 1993), the divorce order conveyed an interest in pension rights, but said nothing about survivorship rights. After the husband's death, the former wife sought to amend the decree retroactively to give herself the survivorship rights that otherwise would lapse. The Michigan courts, applying federal law, held that the decree did not entitle the former wife to a pre-retirement survivor's annuity. *Id.* at 903. *Compare Indiana State Council of Carpenters Pension Fund v. Veclotch,* 785 F.Supp. 106, 108-110 (N.D. Ind. 1992) (genuine issue of fact as to parties' intent regarding survivor annuity precluded summary judgment where divorce agreement referred only to pension, but there was extraneous evidence that parties negotiated survivorship issue and intended former wife to receive survivorship rights).

Fourth, the original decree was entered before the effective date of the Retirement Equity Act. See page 3, *supra.*

After a hearing, the New Jersey state court held that the Plan did not have standing to object to alteration of the divorce decree. Winston Samaroo's estate did not oppose Robichaud's request to amend the decree *nunc pro tunc*, since conveying the survivorship rights once Samaroo was dead did not cost the estate anything, but undid the effect of Samaroo dying without a survivor. The attorney who drafted the agreement testified that the issue of survivor's benefits never came up at the time of the agreement:

> Q: That section [of the agreement] is silent on the issue of survivor benefits?
>
> A: That's correct.
>
> Q: Okay. Was the survivor benefit addressed at that time?
>
> A: No, it never came to mind at that time, it wasn't brought up at all by you [Robichaud], or by Winston, or by me.

Robichaud herself testified that "neither Winston [nor his attorney] or I thought about the survivor rights to this pension." Based on the evidence that the divorce was amicable, the state court amended the divorce decree retroactively to give Robichaud "rights of survivorship to 50% of [Samaroo's] vested pension benefits." The court stated, however, that whether or not the state court order resulted in any benefits becoming payable to Robichaud under the Plan was a question of federal law over which the federal court had retained jurisdiction and which would have to be resolved by the federal court.

After the state court's ruling, Robichaud and the Plan filed cross motions for summary judgment in the pending

federal district court action. The district court examined the statutory requirements for a QDRO under 29 U.S.C. § 1056(d)(3)(C) and (D). The court held that the amended divorce order satisfied the specificity requirements of section 1056(d)(3)(C), but not the substantive requirements of section 1056(d)(3)(D). Under that section a domestic relations order is not a QDRO if it requires the plan to provide any type of benefits not otherwise provided by the plan or to provide increased benefits. 29 U.S.C. § 1056(d)(3)(D)(i) and (ii). The court relied on the reasoning of *Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153, 156 (4th Cir. 1997), to conclude that entitlement to a survivor's annuity in respect of Samaroo had to be determined as of the day Samaroo died, and that the amended divorce decree represented an attempt to obtain increased benefits from the Plan. The court therefore entered summary judgment for the Plan and against Robichaud. Robichaud appeals.

We review a grant of summary judgment de novo, using the same standard the district court must use: summary judgment is proper only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hullett v. Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 111 (3d Cir. 1994).

The district court stated that it would review the Plan's denial of Robichaud's claim under the arbitrary and capricious standard of review appropriate when, as here, a benefit plan gives the plan administrator discretionary authority to construe the terms of the plan. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). 29 U.S.C. § 1056(d)(3)(G)(i)(II) requires the plan

administrator to make the initial determination of whether an order is a QDRO. However, we conclude that the issue in this case is a question of statutory construction regarding the requisites of a QDRO, rather than a question of interpretation of the Plan. *Cf. Hullett*, 38 F.3d at 114 (reserving question of whether administrator's finding of QDRO is reviewed de novo). The deferential standard of review of a plan interpretation "is appropriate only when the trust instrument allows the trustee to interpret the instrument *and when the trustee has in fact interpreted the instrument.*" *Moench v. Robertson*, 62 F.3d 553, 567 (3d Cir. 1995) (emphasis in original) (internal quotation omitted), *cert. denied*, 516 U.S. 1115 (1996). In this case, there is no dispute about the interpretation of the Plan, but only about whether the *nunc pro tunc* order qualifies as a QDRO under federal law. We must review legal conclusions and questions of statutory construction de novo. *See Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606, 611 (5th Cir. 1999) (court should review de novo administrator's decision that a property settlement agreement constituted a QDRO, since that involves interpretation of settlement agreement and statutory construction, not interpretation of the plan).

We turn first to the statutory language defining QDROs. Under section 1056(d)(3)(D)

> A domestic relations order meets the requirements of this subparagraph only if such order –
>
> > (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan, [and]

> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value). . . .

A domestic decree that would have the effect of increasing the liability of the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO, no matter what the decree's status under state law. The district court held that a decree conferring survivor's benefits on Robichaud after those benefits have lapsed would provide increased benefits and therefore cannot be a QDRO.

The district court relied on the Fourth Circuit's decision in *Hopkins*, which recognized that defined benefit plans are based on actuarial calculations that would be rendered invalid if participants were allowed to change the operative facts retroactively. In *Hopkins* a pension plan participant retired and began to draw his pension in the form of a joint and survivor annuity based on the lives of himself and his current wife. Sometime later, his former wife obtained a state court order that she should be treated as the participant's surviving spouse for purposes of the annuity. 105 F.3d at 155. The Fourth Circuit held that this domestic relations order was not a QDRO because the current wife's right to the survivor's benefits vested upon the participant's retirement and could no longer be alienated. *Id.* at 156-57. The court observed in a footnote that its holding was consistent with actuarial necessity:

> Because the disbursement of plan benefits is based on actuarial computations, the plan administrator must know the life expectancy of

> the person receiving the Surviving Spouse Benefits to determine the participant's monthly Pension Benefits. As a result, the plan administrator needs to know, on the day the participant retires, to whom the Surviving Spouse Benefit is payable.

105 F.3d at 157 n. 7.

Reasoning similar to that in *Hopkins* was employed in a New Jersey survivor benefits case, *Ross v. Ross*, 705 A.2d 784 (N.J. Super. Ct. App. Div. 1998). There, a couple's divorce decree purported to convey the survivorship rights in the husband's several pension plans to the wife, but as to one plan the decree was not specific enough to be considered a QDRO. *Id.* at 795. After the divorce, the husband remarried and then died. The first wife attempted to have a QDRO entered after the husband's death to convey the survivorship rights to her. The New Jersey Superior Court, Appellate Division, held that entitlement to survivor's rights was determined as of the day of the participant's death. *Id.* at 796-97. Under ERISA, the rights could only be conveyed by a QDRO. Because there was no QDRO in place at the time of the participant's death, the first wife could not change the result by obtaining a more specific state court order after the rights had vested in the second wife.

Robichaud argues that by determining the right to benefits as of the day of Samaroo's death, the Plan has cheated Samaroo out of receiving any benefit from participating in the Plan. But actually, successful operation of a defined benefit plan requires that the plan's liabilities be ascertainable as of particular dates. The annuity provisions of a defined benefit plan are a sort of insurance,

based on actuarial calculations predicting the future demands on the plan. Some annuity participants will die without ever receiving a payment and some participants will receive payments far in excess of the value of their contributions. The fact that some participants die without a surviving spouse to qualify for benefits is not an unfair forfeiture, as Robichaud contends, but rather part of the ordinary workings of an insurance plan. Allowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan.[3]

Besides, it is inaccurate to say that Samaroo was deprived of any benefit from the Plan. Until he died, Samaroo enjoyed the right to remarry and thereby bestow on a new wife the survivorship rights under his preretirement annuity. Alternatively, after the enactment of the Retirement Equity Act, he could have entered a QDRO conveying the rights to Robichaud. (But if Samaroo had entered a QDRO making Robichaud his "surviving spouse" under the Plan, he would have lost the right to confer the same survivorship benefits on a new wife. *See* 29 U.S.C. § 1056(d)(3)(F) (to the extent QDRO designates former spouse as participant's surviving spouse, current spouse shall not be treated as spouse for purposes of plan)). When Samaroo died without remarrying or naming Robichaud as alternate payee of the survivor's rights, the right to dispose of the benefits lapsed. Allowing

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[3] Our holding and opinion are limited to the particular facts before us, and it is not necessary that we reach the broader issue expressed in the dissent's characterization of our holding, *infra* at 12.

Samaroo (or his estate) to preserve the right to confer the benefits on a new wife as long as he was alive and had the possibility of remarrying, and then to designate Robichaud as the surviving spouse after his death, is allowing him to have his cake and eat it, too.

Robichaud urges us to follow an unpublished district court decision, *Payne v. GM/UAW Pension Plan*, No. 95-CV73554DT, 1996 WL 943424 (E.D. Mich. May 7, 1996), which is of course not binding on us, both because it is a district court case and because it is unpublished. There, a divorcing couple entered a QDRO specifically denying the wife the right to survivor benefits. After the husband's remarriage and death, the first wife obtained a *nunc pro tunc* order in the state court giving her the survivorship benefits the husband had withheld when he was alive. The Eastern District of Michigan held that the *nunc pro tunc* order was effective as a QDRO and that the first wife was entitled to survivor's benefits in accord with that order. *Id.* at *8.

Far from being persuaded by the reasoning in *Payne*, we think it provides a telling demonstration of why the order in this case cannot be regarded as a QDRO. In *Payne*, the husband expressly refused to designate the first wife as his surviving spouse, apparently in view of the fact that he was planning to remarry. After his death (which, incidentally, occurred before he and his new wife had been married long enough for her to qualify for survivor's benefits), the first wife took advantage of his absence to obtain an amended decree giving her the benefits she had not been able to obtain through the divorce negotiations. This is clearly an attempt to expand the pension plan's liability, and the order purporting to

accomplish that expansion cannot therefore be recognized as a QDRO under section 1056(d)(3)(D). By holding that the Plan in this case was obligated to recognize the New Jersey court's order in this case as a QDRO, we would make pension plans vulnerable to the sort of abuse shown in *Payne*.

Finally, Robichaud argues that we must give retroactive effect to the state court amendment of the decree because that decree stated that it was *nunc pro tunc*. Actually, the state judge recognized that he had power only to affect the legal relation between the Robichaud and the Samaroo estate and that the effect of the amendment on the Plan was a matter of federal ERISA law over which the federal district court had retained jurisdiction when it remanded the divorce case to the state courts. The state court said: "Of course, it will be for the federal court to decide whether or not there were any benefits to be left to Ms. Robichaud." This observation was correct; the effect of the amended decree on the Plan is a matter of federal law which the district court did not remand to the state court. *See Samaroo*, 743 F. Supp. at 317.

The judgment of the district court is affirmed.

MANSMANN, *Circuit Judge*, dissenting:

Today the majority holds, in effect, that a state court's power to enter or modify a Qualified Domestic Relations Order ("QDRO") with respect to a participant's interest in a pension plan ends with the participant's death.[1]

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[1] The majority expressly forecloses a post-death modification of a QDRO which requires "increased benefits." In

Because I believe that this holding will work an unwarranted interference with the states' ability to administer their domestic relations law and to effectuate equitable divisions of marital assets, I must respectfully dissent.

Initially, I note that the majority's holding is not compelled by anything in the governing Act. The only statutory authority cited by the majority is 29 U.S.C. § 1056(d)(3)(D), which provides that a QDRO cannot require a plan to provide increased benefits. The majority approves the District Court's holding to the effect that "a decree conferring survivors' benefits on Robichaud after those benefits have lapsed would provide increased benefits and therefore cannot be a QDRO." *Supra* at 12. By assuming that the benefits were conferred after they had lapsed (*i.e.*, after Mr. Samaroo's death), however, it begs the central question whether the state court's entry of its order *nunc pro tunc*, as of a date before Mr. Samaroo's death, is to be given effect.[2]

The majority's holding also is not compelled by case-law. The cases relied on by the District Court and the majority both involved attempts to divest and transfer

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addition, the *Hopkins* and *Ross* cases on which the majority's decision is premised foreclose any shifting of benefits once vested in a particular payee upon a participant's death. *See infra* 12-13. I am therefore unable to conceive of circumstances in which, under the majority's reasoning, a meaningful alteration of a QDRO could be effected post-death.

[2] There appears to be no dispute that if the order had actually been entered on its stated effective date, Ms. Robichaud would be entitled to the survivor's benefit she seeks. There is also no dispute that the Plan did not appeal the state court's decision, making it final.

benefits already vested in a subsequent spouse. *See Hopkins v. AT&T Global Information Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Ross v. Ross*, 705 A.2d 784 (N.J. Super. App. Div. 1998).[3] The only case cited by the parties in which benefits had not vested in another holds that the retroactive decree must be given effect. *See Payne v. GM/UAW Pension Plan*, No. 95-CV-73554-DT, 1996 WL 943424, 1996 U.S. Dist. LEXIS 7966 (E.D. Mich. May 7, 1996).

The majority characterizes the state court's retroactive amendment of a divorce decree in *Payne* as "abuse", apparently because the husband had refused to grant the requested survivor designation in negotiations while he was alive.[4] I am not so ready to presume that a state judge, fully apprised of the facts, possessed of expertise in domestic relations matters, and sworn to uphold the

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[3] The *Ross* holding was premised in part on the Court's observation that "[n]o federal case has allowed a QDRO to be entered after a participant's death." 705 A.2d at 797. However, the (unpublished) *Payne* case was decided prior to *Ross*.

[4] *See supra* at 10-11. The majority's opinion reflects an implicit assumption that domestic relations orders merely reflect what the parties have agreed to. *Cf. supra* at 9-10 (stating that Mr. Samaroo – rather than the state court – could have entered a QDRO while he lived, and that his estate – rather than the state court – designated Ms. Robichaud as surviving spouse after his death). While it may often work that way in practice, I know of no rule that precludes a state court from ordering relief that one party has refused to accede to in negotiations. On the contrary, although courts in New Jersey will enforce consensual agreements for equitable distribution "if found to be fair and just", they nevertheless retain "the utmost leeway and flexibility in determining what is just and equitable in making allocations of marital assets". *Smith v. Smith*, 72 N.J. 350, 359-60, 371 A.2d 1 (1977).

law, has participated in or countenanced abuse. In any event, as discussed below, I believe that we are required to assume that such judicial acts are legitimate.

In rejecting the contention that the state court decree must be given retroactive effect because it stated that it was *nunc pro tunc*, the majority explains that the effect of the decree on the Plan is a matter of federal law over which the District Court had retained jurisdiction. While I agree that the effect was for the District Court to determine under federal law, I cannot agree with the implicit premise that federal law permits us to disregard the decree's express retroactivity provision. On the contrary, federal law mandates that we give effect to the decree in accordance with its terms.

In my view the question before us – whether to effectuate the state court's *nunc pro tunc* order – is conclusively answered in the affirmative by the Full Faith and Credit Act, which provides that the judicial proceedings of a state court "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State. . . . " 28 U.S.C. § 1738. We have observed that this section "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state", and that we may not "employ [our] own rules . . . in determining the effect of state judgments, but must accept the rules chosen by the State from which the judgment is taken". *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133, 141-42 (3d Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996)) (brackets and ellipsis in original; internal quotation marks and citation omitted).

These principles apply in determining the effect of a state decree in a federal action. *See American Sur. Co. v. Baldwin*, 287 U.S. 156, 166 (1932) ("The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial proceedings of a state court drawn into question in an independent proceeding in the federal courts."); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1562 (3d Cir. 1994) (holding that Full Faith and Credit Act bars relitigation of issues decided by a state court even as applied to claims over which the state court lacked jurisdiction) (citing *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985)).

Because the courts of New Jersey would respect a *nunc pro tunc* provision in a final judgment, we are required to respect it as well. *See, e.g., Fulton v. Fulton*, 204 N.J. Super. 544, 549, 499 A.2d 542, 545 (Chanc. Div. 1985) (holding that *nunc pro tunc* entry of divorce decree would determine surviving spouse status for purpose of intestate distribution); *Olen v. Olen*, 124 N.J. Super. 373, 307 A.2d 121 (App. Div. 1973) (remanding for amendment of divorce judgment, *nunc pro tunc* as of original judgment before wife's death).[5]

Although I believe the full faith and credit analysis is dispositive, giving effect to the state court's decree also furthers the policy interests at stake. There is good reason to allow state courts some leeway in entering or modifying domestic relations orders even after a participant's death, or retirement, or other status-altering event. The

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[5] *Cf. Ross*, 705 A.2d at 797 (reasoning that due to ERISA preemption, "New Jersey's concepts of equity cannot be applied and a QDRO cannot be entered after the fact").

state courts are charged with administering the important, and often complex and volatile, area of domestic relations law.[6] The evident purpose of the ERISA's recognition of QDROs is to avoid undue interference with state courts' fulfillment of that charge.[7] Imposing a cut-off date by which a state court's orders must be in prescribed form – a cut-off that does not appear anywhere in the text of ERISA – would unnecessarily impede those courts' efforts to provide for a just disposition of marital assets.[8]

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[6] *See, e.g. Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979) ("The whole subject of domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.") (quoting *In re Burrus*, 136 U.S. 586, 593-594 (1890)); *Brandon v. Travelers Insur. Co.*, 18 F.3d 1321, 1326 (5th Cir.1994) (observing in ERISA preemption analysis that "[f]ederal respect for state domestic relations law has a long and venerable history" and that "[w]hen courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that state law should be given precedence" because "[t]he law of family relations has been a sacrosanct enclave"). *Cf. American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118, 122 (2nd Cir. 1979) (referring to the "fundamental principle of statutory interpretation (whereby) courts have presumed that the basic police powers of the States, particularly the regulation of domestic relations, are not superseded by federal legislation unless that was the clear and manifest purpose of Congress").

[7] As the District Court acknowledged, "Congress' concern that the combination of ERISA preemption and the provisions of REA would lead to unnecessary federal involvement in state domestic relations laws prompted the statutory exemption of [QDROs] from ERISA preemption. *Samaroo*, 743 F.Supp. 309, 315 (D.N.J. 1990) (citing 29 U.S.C. § 1144(b)(7)).

[8] Thus, for example, the court in *Ross* lamented that the "unfortunate result" of its holding (disallowing correction of a

There appears to be no strong countervailing policy reason to warrant such interference in this case. I agree that it is important not to upset the actuarial basis of pension plans, but it is hard to believe that the single survivor benefit at issue here is material to the actuarial soundness of a plan with 87,500 participants. Moreover, the Plan does not allege that it reduced funding levels or otherwise changed its position in reliance on a belief that it would not have to pay a surviving spouse benefit with respect to Mr. Samaroo.

QDRO where benefits had vested in a subsequent spouse) was that "equity will not prevail." 705 A.2d at 797.

Post-death (or post-retirement) entry or modification of a decree may reasonably occur in a variety of circumstances, including, *e.g.*, clerical error, appeals, and delays attendant on the formulation of an appropriate order. This is an example of the former: Mr. Samaroo's attorney, who drafted the domestic relations order, testified that, although they did not specifically discuss survivorship benefits, Mr. Samaroo indicated his intent that Ms. Robichaud receive half interest in "everything he had or was entitled to" and that it was only due to the attorney's unfamiliarity with ERISA that the survivor designation was erroneously omitted. *See* Joint Appendix at 553-54. Counsel also testified that he had no doubt that Mr. Samaroo would have wanted Ms. Robichaud to receive survivorship benefits, *see* Joint Appendix at 555, and confirmed in a submission to the state court that "the intent of [Mr. Samaroo] at that time was to give this 50 per cent [survivorship] right to his then wife unconditionally and without any contingencies thereto." Joint Appendix at 583. Even if the evidence regarding the scrivener's error is inconclusive, the state court's acceptance of the attorney's word should not be disregarded by a federal court bound to give the state court's determination full faith and credit.

Finally, I cannot agree with the majority's contention that designation of Ms. Robichaud as surviving spouse after Mr. Samaroo died without remarrying would allow him to "have his cake and eat it, too"[9] because Mr. Samaroo retained the right to confer surviving spouse status on a new wife so long as no QDRO designated his former wife as surviving spouse. If the state court's *nunc pro tunc* order is credited, after its effective date Mr. Samaroo retained the right to accord a new wife surviving spouse status only to the extent of the 50% interest not already granted to Ms. Robichaud.[10] Thus, Mr. Samaroo would not have been allowed to have his cake and eat it, too; instead, the law allows the state court to divide the cake equitably and mandates that ERISA plans give effect to that division.

For the foregoing reasons, I would reverse the decision of the District Court and remand with instructions to

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[9] Maj. Op. at 10.

[10] The majority cites 29 U.S.D.C. § 1056(d)(3)(F) for the proposition that "if QDRO designates former spouse as participant's surviving spouse, current spouse shall not be treated as spouse for purposes of plan". *Id.* I do not read the statute to provide such an all-or-nothing choice. Under the statute, a former spouse shall be treated as a surviving spouse, and a subsequent spouse shall not be so treated, only "[t]o the extent provided" in a QDRO. 29 U.S.C. § 1056(d)(3)(F). Here, the "extent provided" is 50%. The REA expressly recognizes the right to make such partial designations. *See* 29 U.S.C. § 1056(d)(3)(B)(i)(I) (defining QDRO as order which, *inter alia*, recognizes or assigns right to receive "all or a portion" of benefits under a plan). A natural reading would call for treating Ms. Robichaud as surviving spouse to the extent of 50% of the applicable benefit, and treating a new wife (if any) as spouse only to the extent of the remaining 50%.

accord full faith and credit to the state court's retroactive QDRO.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON, NEW JERSEY

Clerk, Superior Court of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

RE:
LOUIS [sic] ROBICHAUD SAMAROO,
vs. WINSTON R. SAMAROO
Our Civil No. 89-2215(GEB)
Your Number FM 7705-85

Dear Sir:

Pursuant to the order of remand entered in the above entitled matter by this Court, please find enclosed two (2) certified copies of the order remanding the action, and two (2) certified copies of the docket entries.

Sincerely,

William T. Walsh, Clerk

/s/ Michael D. Shanklin
Michael D. Shanklin
Deputy Clerk

cc: (letter only)
file
Collier, Jacob & Sweet, Esqs.
Bruce P. McMoran, Esq. attn: William A. Behan, Esq.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AT&T MANAGEMENT PENSION PLAN, Plaintiff, vs. LOUISE M. ROBICHAUD, Defendant.	:	CIVIL NO. 89-2216(GEB)
LOUISE ROBICHAUD SAMAROO, Plaintiff, vs. WINSTON R. SAMAROO, Defendant.	:	CIVIL NO. 89-2215(GEB) MEMORANDUM AND ORDER (Entered 3-2[illegible]0)

BROWN, District Judge

This matter is before the Court on three motions: (1) Louise Robichaud's motion, as plaintiff, to remand Civil No. 89-2215 to state court; (2) Louise Robichaud's motion, as defendant, to dismiss Civil No. 89-2216; and (3) Plaintiff, AT&T Management Pension Plan's, motion to consolidate Civil No. 892215 and Civil No. 89-2216. The Court has considered both the written contentions of the parties and oral argument.

I. BACKGROUND

The genesis of this dispute arose on October 25, 1984, when the New Jersey Superior Court, Chancery Division, entered a Final Judgment of Divorce dissolving the marriage of Louise Robichaud Samaroo (hereinafter Robichaud) to Winston Samaroo. That Final Judgment of Divorce incorporated a settlement agreement, the only relevant portion of which provided:

> (d) Pensions, Profit Sharing and Bell System Savings Plan – (1)
> Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. *At the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount.*

See Settlement Agreement, ¶ 3.2(d) (emphasis added).

At the time of the divorce, Winston Samaroo was employed by AT&T Technologies, and he enjoyed vested pension rights in the AT&T Management Pension Plan ("AT&T-MPP"). It was one-half of these rights which Winston Samaroo assigned to his former wife under the settlement agreement. Before reaching retirement, however, Winston Samaroo died on September 20, 1987. Louise Robichaud submitted the settlement agreement to AT&T-MPP and requested payment of one-half of her former husband's vested pension benefit.

In June 1988, AT&T-MPP denied Robichaud's claim for benefits, finding that the settlement agreement did not create any right in Robichaud to survivor benefits, but merely gave her a right to receive benefits upon Winston Samaroo's retirement. AT&T-MPP further found

that, because the Employee Retirement Income Security Act (ERISA) permits the creation of a survivor benefit only in favor of an existing "participant" in the pension plan, and because Winston Samaroo's status as a "participant" ended at his death, any attempt by Robichaud to amend the Final Judgment of Divorce would be unenforceable under ERISA.

Undaunted by AT&T-MPP's position, Robichaud filed a motion in the New Jersey Superior Court, Chancery Division, to amend the Final Judgment of Divorce and join AT&T-MPP as a party under N.J.Ct.R. 4:28-1 and 4:28-2.[1] AT&T-MPP timely filed a Petition for Removal with this Court pursuant to 28 U.S.C. §1441. The Petition for Removal, Civil No. 89-2215(GEB), alleged federal jurisdiction under ERISA on the ground that the motion by Robichaud to amend the Final Judgment of Divorce "is an action by an alleged beneficiary of an ERISA-qualified pension benefit plan to secure benefits from that plan." AT&T-MPP simultaneously filed a complaint in this Court for declaratory relief. That complaint, Civil No. 89-2216(GEB), seeks an order:

> (1) declaring that Winston Samaroo's rights under the pension plan were finally determined on the date of his death and cannot now be retroactively changed;

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[1] Rule 4:28-1 is the state equivalent to Fed.R.Civ.P. 19 (Joinder of Persons Needed for Just Adjudication) and Rule 4:28-2 permits a fiduciary to be named. Robichaud's motion was not a new civil action; it was a motion directed at the original divorce action, which was captioned *Samaroo v. Samaroo*, Docket No. FM-07705-85.

(2) declaring that Robichaud is not entitled to any survivor benefits under the pension plan;

(3) declaring that any order issued by the Superior Court of New Jersey, Chancery Division, amending the settlement agreement would be inconsistent with ERISA; and

(4) declaring that the Final Judgment of Divorce, which incorporated the settlement agreement, cannot be modified *nunc pro tunc* following the death of Winston Samaroo.

Robichaud has now filed a motion to remand the removed state action, Civil No. 89-2215(GEB), on the ground that this action does not arise under ERISA, and no other basis of federal jurisdiction exists to support removal. Robichaud has also filed a motion to dismiss the declaratory judgment action, Civil No. 89-2216(GEB), for substantially the same reasons. AT&T-MPP has moved to consolidate both actions, and opposes Robichaud's motions on the argument that the broad scope of ERISA confers jurisdiction on this court.

II. DISCUSSION

A. The Statutory Framework

A brief review of the federal statutory framework is necessary to a full understanding of the jurisdictional issues before the Court. Prior to 1984, ERISA prohibited the alienation or assignment of pension plan benefits. *See* 29 U.S.C. §1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."). On August 23, 1984, Congress amended ERISA by passing the Retirement Equity Act

(REA), the provisions of which became effective January 1, 1985. REA permits a pension plan participant to alienate or assign benefits under a domestic relations order,[2] but only if the order is "determined to be a qualified domestic relations order." *See* 29 U.S.C. §1056(d)(3)(A). A domestic relations order must satisfy the requirements of §1056(d)(3)(C) and (D) before it can be a "qualified domestic relations order." The first of these two subsections outlines the information which a domestic relations order must contain:

> (C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –
>
> > (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
> >
> > (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

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[2] REA defines a domestic relations order as "any judgment, decree, or order (including approval of a property settlement agreement) which –

> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
>
> (II) is made pursuant to a State domestic relations law (including a community property law).

See 29.U.S.C. §1056(d)(3)(B)(ii).

> (iii) the number of payments or period to which such order applies, and
>
> (iv) each plan to which such order applies.

29 U.S.C. §1056(d)(3)(C). The second subsection limits the ability of a participant to assign or alienate benefits:

> (D) A domestic relations order meets the requirements of this subparagraph only if such order –
>
> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. §1056(d)(3)(D).

One other aspect of the statutory framework is of particular relevance here. Congress was concerned that the combination of ERISA's sweeping preemption of state law, 29 U.S.C. §1144(a), and the provisions of REA would result in unwarranted federal interference with state domestic relations laws. Congress solved the problem by exempting qualified domestic relations orders from ERISA preemption. *See* 29 U.S.C. §1144(b)(7). In other words, to the extent REA is silent concerning qualified domestic relations orders, state courts will issue them in accordance with state law.

Having summarized the pertinent provisions of ERISA and REA, the Court turns to the jurisdictional contentions of the parties. Because jurisdiction over AT&T-MPP's declaratory judgment action may depend on the propriety of removal of Robichaud's original action in state court, the Court first addresses Robichaud's motion to remand Civil No. 89-2215(GEB).

B. Motion to Remand

Removal jurisdiction is defined by 28 U.S.C. §1441, and it is essentially coextensive with the original jurisdiction of the federal district courts, *see* 28 U.S.C. §1441(a).[3] As such, a case is removable from state court if it is "founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . . " 28 U.S.C. §1441(b). AT&T-MPP has sought removal on the ground that Robichaud's action in state court arises under federal law, in that it is an action "by an alleged beneficiary of an ERISA-qualified pension benefit plan to secure benefits from that plan." *See* 29 U.S.C. §1132(a)(1)(B) ("A civil action may be brought by a . . . beneficiary . . . to recover benefits due to him under the terms of his plan. . . . ").

Under the "well-pleaded complaint" rule, whether a case arises under federal law "must be determined from

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[3] Only one statutory distinction is made between original jurisdiction and removal jurisdiction: whereas original jurisdiction extends to a suit between diverse parties, 28 U.S.C. §1332, the removal statute requires not only diversity, but also that all of the removing defendants be nonresidents. *See* 28 U.S.C. §1441(b). This distinction is not important here, because the only proffered basis of jurisdiction is a federal question.

what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914), *quoted in Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). The statement of Robichaud's claim in *Samaroo v. Samaroo* is contained, not in the usual form of a complaint, but in a certification. Robichaud stated in her certification that, although the terms of the divorce did not explicitly give her survivor benefits[4], it "was never contemplated or intended that I would receive zero [benefits] in the event of my former husband's death prior to his retirement." *See* Robichaud Certification, ¶9. Robichaud accordingly requested that the state court amend the divorce judgment *nunc pro tunc* October 25, 1984, to both reflect her survivorship rights and comply with the requirements of REA for qualified domestic relations orders.

Were this the only relief Robichaud sought, the Court would have little trouble concluding that the state action did not "arise under" federal law. Amendment of the Final Judgment of Divorce to reflect Robichaud's right to survivor's benefits is not a remedy expressly granted by federal law, nor would it require the interpretation of a federal statute or application of a distinctive federal policy. *See, e.g., Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir.

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[4] The settlement agreement, incorporated in the judgment of divorce, merely provided that at "the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount."

1974) ("An action arises under the laws of the United States if and only if the complaint seeks a remedy expressly granted by a federal law or if it requires the construction of a federal statute or a distinctive policy of a federal statute requires the application of federal legal principles for its disposition."). *See also Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808-09 (1986). But this was not the only remedy Robichaud sought to pursue in state court, because she also joined AT&T-MPP as a defendant. She sets forth the reasons for this joinder in paragraph 13 of her certification:

> Attached is a copy of a recent [New Jersey Superior Court,] Appellate Division decision, *Cleveland vs. Board of Trustees, Police and Firemen's Retirement System*, which indicates at P. 9 that the Plan Administrator of AT&T should be joined in this action *in order to be directed to pay over to me my 50 percent interest*. Because of this recent decision, I have joined the Plan Administrator of AT&T as a fiduciary and as an indispensable party under [N.J.Ct.] Rules 4:28-1 and 4:28-2.

(emphasis added).

The case to which Robichaud refers, *Cleveland v. Board of Trustees, Police and Firemen's Retirement System*, 229 N.J. Super. 156 (App. Div. 1988), was a suit by a divorcee against a state pension fund to enforce a divorce judgment which provided that the pension fund would pay directly to the divorcee her share of her former husband's benefits. The divorcee sought to hold the pension fund in contempt for failing to comply with that judgment. The Appellate Division held otherwise, relying

on the divorcee's failure to join the pension fund as a party to the original divorce proceeding:

> Finally, Mrs. Cleveland asserts on appeal that the Board of Trustees should be held in contempt for failing to comply with the provision of the divorce judgment which purported to order the administrator of the New Jersey Police and Firemen's Retirement System to make payments directly to her. We reject that assertion. *She could have joined the Trustees of the Fund as a party to the divorce proceeding, but she failed to do so. The judgment was therefore not binding upon the Fund.*

Id. at 162-63 (emphasis added).

This passage from *Cleveland*, coupled with the statement in paragraph 13 of her certification, makes it abundantly clear that Robichaud's ultimate goal in joining AT&T-MPP was an order from the state court directing AT&T-MPP to pay her half of her former husband's retirement benefit.[5] Robichaud takes the contrary position on this motion to remand, arguing that her only intention is to secure a qualified domestic relations order for eventual presentment to AT&T-MPP. The statement in her certification, however, belies that argument, and it is this statement which controls the jurisdictional inquiry

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[5] Further support for this conclusion can be found in the certification of Joel Spivak, Esq., who represented Winston Samaroo throughout the divorce proceedings. In addition to stating his belief that his deceased client intended to give Robichaud a right to survivor's benefits, Spivak urged the state court to amend the Final Judgment of Divorce "to require AT&T's Plan Administrator to pay to Ms. Robichaud her 50 percent interest in all pension benefits that were acquired during the marriage." *See* Spivak Certification, ¶5.

under the "well-pleaded complaint" rule. The Court therefore concludes that Robichaud's joinder of AT&T-MPP transforms the state action, at least in part, into an action by an alleged beneficiary "to recover benefits due . . . under the terms of [a] plan," 29 U.S.C. §1132(a)(1)(B), and as such is an action over which this Court has original jurisdiction.

That this Court has original jurisdiction over at least part of the case creates more jurisdictional problems than it solves. The next question before the Court is whether the whole of *Samaroo v. Samaroo*, or only the federal claim against AT&T-MPP, is properly removable under 28 U.S.C. §1441. If removal of the whole case is proper, it must be so under either §1441(b) or (c):

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .
>
> (c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1441(b) has been universally interpreted to permit removal of non-federal claims only if they are within the pendent jurisdiction of the Court. *See United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Hurn v. Oursler*,

289 U.S. 238 (1933). In the archetypal case, where a plaintiff asserts state and federal claims against the same defendant, federal judicial power to hear both would hinge on whether the claims "derive from a common nucleus of operative fact" such that "the entire action before the Court comprises but one constitutional 'case'." *Gibbs*, 383 U.S. at 725. A common example is where an inmate sues a state-employed physician and joins a state claim for medical malpractice with a federal claim under the Eighth Amendment. These claims are so closely related that the inmate would "ordinarily be expected to try them [both] in one judicial proceeding. . . . *Id.*

Persuasive reasons exist why this Court should decline the exercise of pendent jurisdiction over Robichaud's motion to amend the Final Judgment of Divorce. Prominent among them is the fact that here, unlike the example given above and unlike *Gibbs*, the non-federal claim is asserted against a different party than is the federal claim. The non-federal claim is purely a dispute between Robichaud and the estate of her former husband over the terms of their divorce. Extending federal jurisdiction to this dispute therefore involves a somewhat different inquiry than that undertaken in *Gibbs*. That inquiry was outlined in *Aldinger v. Howard*, 427 U.S. 1 (1976), where the Supreme Court, though reluctant to establish an all-encompassing rule for "pendent party" jurisdiction, acknowledged that "there is a more serious obstacle to the exercise of pendent jurisdiction [over additional parties] than if parties already before the court are required to litigate a state-law claim." *Id.* at 18. The Court in *Aldinger* held that to assert such "pendent party" jurisdiction, "a federal court must satisfy itself not only

that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Id.*

We need not consider the scope of Article III of the Constitution here, for the Court is persuaded that Congress has shown a clear resolve not to extend federal jurisdiction to this domestic relations dispute. To begin with, it has long been settled doctrine that the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). *See also Barber v. Barber*, 62 U.S. (21 How.) 582 (1859). As the Second Circuit reflected in a more recent case:

> More than a century has elapsed since the *Barber* dictum without any intimation of Congressional dissatisfaction. It is beyond the realm of reasonable belief that, in these days of congested dockets, Congress would wish the federal courts to seek to regain territory. . . .

Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973), *quoted in Solomon v. Solomon*, 516 F.2d 1018, 1025 (3d Cir. 1975).

The apparent hesitance of Congress to encroach upon an area historically reserved to the states is not, however, the only evidence of congressional will. For there is evidence in ERISA itself that Congress intended to negate the same type of assumption of jurisdiction which AT&T-MPP now urges upon the Court. As the Court explained above, Congress' concern that the combination of ERISA preemption and the provisions of REA would lead to

unnecessary federal involvement in state domestic relations laws prompted the statutory exemption of qualified domestic relations orders from ERISA preemption. *See* 29 U.S.C. §1144(b)(7). The Court finds this to be convincing evidence that the dispute in this case over Robichaud's right to survivor's benefits is not one which Congress wanted this Court to hear. Accordingly, the Court holds that the exercise of "pendent party" jurisdiction, assuming removal under §1441(b), would be inconsistent with the intent of Congress.

The remaining question is whether removal of the dispute between Robichaud and her deceased ex-husband over the terms of the divorce is otherwise allowable under §1441(c). The Supreme Court has only once considered the parameters of §1441(c). *American Fire and Cas. Co. v. Finn*, 341 U.S. 6 (1951). In *Finn*, the Court found that Congress, in enacting §1441(c), intended to make removal more difficult than it had been under 28 U.S.C. §71, the former removal statute. Where the former statute permitted the removal of a separable "controversy,"[6] §1441(c) now requires a "separate and independent claim or cause of action." As the Court in *Finn* explained it,

> 'separate cause of action' restricts removal more than 'separable controversy.' In a suit covering

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[6] The former statute provided in full:

> And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district.

> multiple parties or issues based on a single claim, there may be only one cause of action and yet be separable controversies. The addition of the word 'independent' [in §1441(c)] gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal.

Id. at 12 (footnote omitted).

In *Finn*, a Texas resident sued two nonresident insurance companies and their resident agent in a Texas state court. The plaintiff claimed that the companies and their agent were jointly and severally liable for a property loss suffered by the plaintiff. The companies removed the claims against them under §1441(c), but the Supreme Court held that removal was improper under the statute. In so holding, the Court stated that "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under §1441(c)." *Id.* at 14.

At first glance, §1441(c) might appear to permit removal of this domestic relations dispute where §1441(b) does not. As the courts and commentators have recognized, the current structure of the removal statute seems to "suggest that when a defendant removes an 'arising under' case, any state claims involved are either sufficiently closely related to the federal claims to be considered 'pendent' (and thus removable under §1441(b)), or they are sufficiently unrelated to be considered 'separate and independent' (and thus removable under §1441(c))." *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 708 F.2d

1, 9 (1st Cir. 1983) (citing Wright, Miller & Cooper, Federal Practice and Procedure, §3724, at 649 (1976)). This statutory anomaly apparently exists because Congress had only diversity cases in mind when it enacted §1441(c). The former statute, 28 U.S.C. §71, was specifically limited to suits in diversity, *see supra* note 6, and it was the ease with which removal could be accomplished under that statute that Congress intended to change by the passage of §1441(c). *See Finn, supra.* Although Congress deleted the specific reference to diversity in the new statute, there is no indication that it foresaw its application to federal question cases. *See Charles D. Bonanno,* 708 F.2d at 10 (citing Cohen, *Problems in the Removal of a "Separate and Independent Claim or Cause of Action,"* 46 Minn. L. Rev. 1 (1961)).

In view of the expressed design of Congress to restrict the removability of diversity cases, it would be unwarranted to assume that Congress also meant to expand the removability of federal question cases to encompass wholly unrelated state claims that are not within the original or even pendent jurisdiction of the district courts. Indeed, several courts and commentators have questioned the constitutionality of this result. *See, e.g., Thomas v. Shelton,* 740 F.2d 478, 483 (7th Cir. 1984) ("For a combination of two claims one of which is completely unrelated to any claim within the federal district courts' original jurisdiction may not be one case within the meaning of Article III of the Constitution, in which event the unrelated claim would be outside that jurisdiction."; *see also* Lewin, *The Federal Courts' Hospitable Back Door – Removal of "Separate and Independent" Non-Federal Causes of Action,* 66 Harv. L. Rev. 423, 431-42 (1953).

This Court is convinced that the dispute between Robichaud and her deceased ex-husband is not removable under §1441(c), but it is unnecessary for the Court to rest exclusively on evidence of congressional intent, or on a finding that §1441(c) cannot be constitutionally applied in this instance. For even if it is removable under §1441(c) as a "separate and independent" claim, the statute explicitly gives this Court discretion to "remand all matters not otherwise within its original jurisdiction", and this Court would choose to exercise that discretion to remand this domestic relations dispute. In sum, to the extent AT&T-MPP has removed that portion of *Samaroo v. Samaroo* involving the terms of the Final Judgment of Divorce, the Court will grant Robichaud's motion to remand. To the extent, however, that AT&T-MPP has removed Robichaud's claim against it for payment of her former husband's retirement benefits, the motion to remand will be denied.

C. Motion to Dismiss

Robichaud has also moved to dismiss AT&T-MPP's declaratory judgment action, Civil No. 89-2216. Her only argument is that the action is merely an offensive assertion of a preemption defense, and that federal jurisdiction is therefore lacking. This argument, however, is necessarily foreclosed by the Court's determination that Robichaud's claim against AT&T-MPP arises under federal law.

AT&T-MPP brought Civil No. 89-2216 under the Declaratory Judgment Act, 28 U.S.C. §2201. Though the Act expands the remedies available in federal court, it

does not provide an independent basis of jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). The existence of jurisdiction will thus depend on "whether the defendant against whom declaratory judgment is sought could have asserted his rights in a federal court." *Transamerica Occidental Life Ins. Co. v. Digregorio*, 811 F.2d 1249, 1253 (9th Cir. 1987) (citing *Skelly Oil*). The answer to this question is now simple. Because Robichaud, the "declaratory judgment defendant", could have sued AT&T-MPP directly in this Court under 29 U.S.C. §1132(a)(1)(B), this Court has jurisdiction over AT&T-MPP's declaratory judgment complaint. Robichaud's motion to dismiss Civil No. 89-2216 will therefore be denied.

D. Motion to Consolidate

AT&T-MPP seeks consolidation of Civil No. 89-2215 and Civil No. 89-2216 under Fed.R.Civ.P. 42(a). Robichaud has not contended that consolidation would be inappropriate, and this Court knows of no reason why these actions should proceed separately. AT&T-MPP's motion will accordingly be granted.

E. Abstention

Because the Court has found that part of this case must proceed in state court, one other question remains: should the proceedings in this Court be stayed pending the state court's determination of Robichaud's motion to amend the Final Judgment of Divorce? The decision to decline or defer the exercise of federal jurisdiction in

favor of parallel state litigation is governed by the principles laid down in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). In those cases, the Supreme Court declared that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them," but that in "exceptional circumstances" abstention may be appropriate. *Colorado River*, 424 U.S. at 811.

The Supreme Court outlined a number of factors which must be considered before a court decides to abstain. Those factors are: (1) whether the state court has assumed jurisdiction over property, (2) the inconvenience of the federal forum, (3) the desirability of avoiding piecemeal litigation, and (4) the order in which jurisdiction was obtained by the state and federal courts. *Id.* at 818. The first factor has no application here, and the second militates against abstention, because this Court is just as convenient a forum as the state court. The other factors, however, weigh heavily in favor of a stay. Not only was the state court the first to assume jurisdiction, but more importantly, the proceedings there may well obviate the need to address any of the issues properly removed to this Court. As Ms. Robichaud concedes, if the state court refuses to amend the Final Judgment of Divorce, she has no viable claim for benefits against AT&T-MPP. Permitting the action here to proceed at this time is, therefore, inefficient, and possibly unnecessary. This case is similar to *Lumen Construction, Inc. v. Brant Construction Company*, 780 F.2d 691 (7th Cir. 1985), where the Seventh Circuit held that abstention was proper because the civil rights claims in federal court could not

be adjudicated until the state court had resolved certain contract claims under state law. *Id.* at 696. This Court concludes that a stay is appropriate here to allow the state court an opportunity to resolve Robichaud's motion to amend the Final Judgment of Divorce. An order to this effect will be entered, and the Court will, of course, retain jurisdiction.

III. CONCLUSION

To summarize, *Samaroo v. Samaroo* is really two cases masquerading as one. The first case is a dispute between Robichaud and the estate of her former husband over the terms of their divorce. As the Court has outlined above, no basis under §1441 exists to support removal of this dispute, and it therefore must be remanded to state court. The second case, however, is a claim by Robichaud against AT&T-MPP for payment of her former husband's retirement benefit. Because that claim arises under ERISA, it was properly removed to this Court. Moreover, this Court also has jurisdiction over AT&T-MPP's declaratory judgment action, since Robichaud could have sued AT&T-MPP directly in this Court for benefits under 29 U.S.C. §1132(a)(1)(B). The Court will consolidate the properly removed claim in *Samaroo v. Samaroo* with the declaratory judgment action, but will stay the consolidated case until all state proceedings in *Samaroo v. Samaroo* are resolved.

For the above reasons, it is on this 27th day of MARCH, 1990,

ORDERED that Louise Robichaud's motion to remand Civil No. 89-2215 be and is hereby granted in part as outlined in this Memorandum & Order, and it is

FURTHER ORDERED that Louise Robichaud's motion to dismiss Civil No. 89-2216 be and is hereby denied, and it is

FURTHER ORDERED that AT&T-MPP's motion to consolidate Civil No. 89-2215 and 89-2216 be and is hereby granted, and it is

FURTHER ORDERED that this consolidated action be and is hereby administratively terminated, without prejudice to the right of either party to reopen it upon the resolution in state court of any and all related proceedings in *Samaroo v. Samaroo*.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AT&T MANAGEMENT PENSION PLAN, Plaintiff, v. LOUISE M. ROBICHAUD, Defendant.	Civ. No. 89-2215(GEB)
LOUISE ROBICHAUD SAMAROO, Plaintiff, v. WINSTON R. SAMAROO, Defendant.	Civ. No. 89-2216(GEB) **MEMORANDUM OPINION** (Filed Apr. 21, 1998)

BROWN, District Judge

This matter comes before the Court upon the motion of defendant Louise M. Robichaud for summary judgment or, in the alternative, to dismiss the AT&T Management Pension Plan's ("ATT-MPP") Complaint for Declaratory Relief, and the cross-motion of ATT-MPP for summary judgment on its Complaint for Declaratory Relief. For the reasons set forth in this Memorandum Opinion, this Court will deny defendant's motion for

summary judgment and grant ATT-MPP's motion for summary judgment.

I. BACKGROUND

The facts originally giving rise to this matter have been fully and adequately set forth in this Court's prior opinion in this matter, *Samaroo v. Samaroo*, 743 F.Supp. 309 (D.N.J. 1990), and will be discussed only as they are necessary for the Court's determination of the motions currently pending.

By Order dated March 28, 1990, this Court remanded defendant's application to amend her final judgment of divorce to the New Jersey Superior Court, as such application concerned a proceeding governed by state law. *See* Certification of Louise M. Robichaud ("Robichaud Certif.") ¶ 16. This Court also stayed the federal proceedings in this matter, pending the resolution of the matter in state court. *See id.* ¶ 17.

The state court matter was eventually tried before the Honorable Thomas H. Dilts, New Jersey Superior Court, Chancery Division – Family Part. *See id.* ¶ 20. By bench decision, dated June 28, 1996, Judge Dilts granted defendant's motion to amend her final judgment of divorce and made such amendment *nunc pro tunc* as of January 1, 1985. *See id.* ¶¶ 22, 26. Judge Dilts determined that the testimony presented, as well as the terms of the separation and divorce between defendant and Winston Samaroo ("Samaroo"), indicated that it was the intent of the parties to the original final judgment of divorce to

make defendant the full beneficiary of Samaroo's pension, which would include entitling defendant to survivor's benefits and rendering her the alternate payee of Samaroo's pension benefits. *See id.* ¶ 22. Judge Dilts did note, however, that it would be up to this Court to determine the applicability of defendant's amended final judgment of divorce to her claim for benefits from an ERISA-governed plan. *See id.* ¶ 27.

On June 28, 1996, Judge Dilts entered an amended judgment of divorce, which provided that the final judgment of divorce was modified "to provide for Plaintiff's rights of survivorship to 50% of Defendant's vested pension benefits, and to be properly recognized, as beneficiary and alternate payee of those rights." *See id.* ¶ 25. Shortly thereafter, defendant, upon the direction of Judge Dilts, prepared a proposed qualified domestic relations order ("QDRO"), which was forwarded to ATT-MPP, along with a copy of the amended judgment of divorce, for qualification and approval. *See id.* ¶ 29. By letter dated October 10, 1996, Actuarial Sciences Associates, Inc., a service provider to ATT-MPP, denied defendant's claim for benefits.[1] *See id.* ¶¶ 30-31. Defendant then filed the

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[1] In reviewing the denial of defendant's claim by the ATT-MPP pension plan administrator, this Court will utilize the arbitrary and capricious standard of review. When a benefit plan gives the administrator discretionary authority to determine a claimant's eligibility for benefits or to construe the terms of the pension plan, the de novo standard of review is not appropriate. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In situations where the plan administrator has such authority, the correct standard is arbitrary and capricious. *See Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993); *Stoetzner v. United States Steel Corp.*, 897 F.2d 115, 119 (3d

instant motion for summary judgment, or in the alternative dismissal of ATT-MPP's complaint for declaratory relief ATT-MPP subsequently filed the instant cross-motion for summary judgment.

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment Motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Rule 56(e) requires him to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity*

Cir. 1990); *Rizzo v. Paul Revere Ins. Group*, 925 F. Supp. 302, 307 (D.N.J. 1996), *aff'd*, 111 F.3d 127 (3d Cir. 1997). This standard is essentially the same as the abuse of discretion standard, and requires this Court to defer to the decision of the plan administrator, unless the decision is "without reason, unsupported by substantial evidence or erroneous as a matter of law." *See Rizzo*, 925 F. Supp. at 310. Inasmuch as the ATT-MPP plan administrator and committee have the discretionary authority to evaluate claims and construe the terms of the plan, the arbitrary and capricious standard is appropriate for the case at bar. *See* AT&T Management Pension Plan's Complaint for Declaratory Relief, Exh. A § 3, ¶¶ 1, 2.e.(i), 4 (setting forth the authority vested in the plan administrator and committee).

Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. Standards Under ERISA

Prior to 1984, ERISA prohibited the alienation or assignment of pension plan benefits. *See* 29 U.S.C. § 1056(d)(1) ("Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."). On August 23, 1984, Congress amended ERISA by passing the Retirement Equity Act ("REA"), the provisions of which became effective January 1, 1985. REA permits a pension plan participant to alienate or assign benefits under a domestic relations order,[2] but only if the order is "determined to be a qualified domestic relations order." 29 U.S.C. § 1056(d)(3)(A). A domestic relations order must satisfy the requirements of § 1056(d)(3)(C) and (D) before it can be a "qualified domestic relations order." The first of these two subsections outlines the information which a domestic relations order must contain:

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[2] REA defines a domestic relations order as "any judgment, decree, or order (including approval of a property settlement agreement) which . . . (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to a State domestic relations law (including a community property law)." 29 U.S.C. § 1056(d)(3)(B)(ii).

> (C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies –
>
> (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
>
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
>
> (iii) the number of payments or period to which such order applies, and (iv) each plan to which such order applies.

29 U.S.C. § 1056(d)(3)(C). The second subsection limits the ability of a participant to assign or alienate benefits:

> (D) A domestic relations order meets the requirements of this subparagraph only if such order –
>
> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
>
> (iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be qualified domestic relations order.

29 U.S.C. § 1056(d)(3)(D).

The other provision of ERISA's framework that is relevant to the instant action deals with preemption. Congress was concerned that the combination of ERISA's sweeping preemption of state law, 29 U.S.C. § 1144(a), and the provisions of REA would result in needless federal interference with state domestic relations laws. Congress avoided this potential comity problem by exempting qualified domestic relations orders from ERISA preemption. *See* 29 U.S.C. § 1144(b)(7). Thus, to the extent REA is silent concerning qualified domestic relations orders, state courts will issue them in accordance with state law.

In turning to the case at bar, the Court must first determine whether the domestic relations order ("DRO")[3] prepared by defendant in accordance with the order issued by Judge Dilts in the state court is qualified pursuant to the requirements of § 1056(d)(3)(C).[4] Judge Dilts,

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[3] For the purposes of this Court's discussion, the domestic relations order prepared by defendant will be referred to as the proposed DRO or order. only after such an order has satisfied the criteria to be "qualified" under the terms of ERISA will such an order be a QDRO. Inasmuch as defendant's order fails to satisfy these requirements, it will not be referred to as a QDRO. Any reference to a QDRO in the Court's opinion pertains to some other domestic relations order or the statutory language of ERISA.

[4] Defendant is correct in her assertion that a QDRO may be entered following the death of a pension plan participant. *See* United States Dept. of Labor, Pension and Welfare Benefits Administration, THE DIVISION OF PENSIONS THROUGH QUALIFIED DOMESTIC RELATIONS ORDERS, Q.1-8 at 7-8 (1997); *see also Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 (4th Cir. 1997) (stating that a QDRO can be obtained at any time). However, to be classified as a QDRO, the order must not require the pension

in issuing his recent order amending the final judgment of divorce of defendant and Samaroo, provided that defendant was entitled to "rights of survivorship to 50% of [Samaroo]'s vested pension benefits, and to be properly recognized as beneficiary and alternate payee of those rights." *See* Robichaud Certif., Exh. 13 ¶ 1. Defendant's proposed DRO designated her as the "alternate payee" of Samaroo's vested pension benefits. In analyzing the provisions of the proposed DRO in accordance with the language of ERISA, this Court finds that the DRO prepared by defendant does not meet these criteria.

Subsection (C)(i) of 29 U.S.C. § 1056(d)(3) requires that the proposed DRO set forth the name and last known mailing address for the pension plan participant as well

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plan to provide any type or form of benefit not otherwise provided under the plan, or to provide increased benefits. *See* 29 U.S.C. § 1056(d)(3)(D)(i) and (ii). Any order that operates to require either of these of a pension plan governed by ERISA fails to be a "qualified" DRO pursuant to the terms of ERISA. Therefore, the threshold issue this Court must address is whether defendant's proposed DRO is qualified, thus rendering her entitled to benefits from ATT-MPP.

As ATT-MPP points out, the entry of a QDRO after a participant's death would be most appropriate in the case of a pension plan that utilizes individual accounts. *See* Letter of Christopher H. Mills at 2 (Dec. 5, 1997). In that instance, there is a fixed amount being held on behalf of the participant, and the only issue is the proper beneficiary of the account funds, not whether benefits should be paid at all. Thus a DRO entered after death in that situation could still qualify as a QDRO, since it would not require the provision of any type or form of benefit not otherwise provided under the pension plan, nor would it require increased benefits to be paid by the plan.

as any alternate payees covered by the order. In reviewing the proposed DRO in this matter, attached to defendant's Certification as Exhibit 14, the Court notes that defendant sets out her name and mailing address, as alternate payee covered by the order, but sets out only the name of the participant. *See* Robichaud Certif., Exh. 14 at 3 (setting forth in the "Data on Parties to this Action" section only the name, social security number, and employment history for Samaroo, as information on the Estate of Winston Samaroo, but no last known mailing address). By failing to include the last known mailing address of Samaroo, defendant failed to satisfy this subsection of the statute. However, inasmuch as defendant set forth the participant's name and relevant information, and stated that the other party to the domestic relations order is an estate, which may not have a mailing address other than that of the executor, the Court will deem this subsection satisfied and continue with the analysis.

Subsection (C)(ii) requires that the "amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined," also be included in the proposed DRO. 29 U.S.C. § 1056(d)(3)(C)(ii). In the case at bar this requirement is satisfied by the third "Whereas" clause of the proposed order prepared by defendant. That clause states that the amended judgment of divorce modified the final judgment of divorce dated October 25, 1984, "to provide for [Robichaud's] rights of survivorship to 50% of [Samaroo's] vested pension benefits." *See* Robichaud Certif., Exh. 14 at 2. This clause satisfies the requirement of

subsection (C)(ii) in that it specifies the amount or percentage of Samaroo's benefits to be paid by the plan to defendant, thereby satisfying the first clause of this subsection. Thus, this subsection is met by the language of defendant's proposed DRO.

The next requirement of the statute is that the proposed DRO provide the number of payments or period to which such order applies, as set out in subsection (C)(iii). *See* 29 U.S.C. § 1056(d)(3)(C)(iii). Defendant's proposed DRO states that she is entitled to benefits commencing on the date that Samaroo would have become eligible to receive his benefits from the ATT-MPP plan. The proposed DRO further provides that defendant was the "survivor" of Samaroo's pension benefits. Pursuant to ERISA, the period of duration for a survivor annuity is "the life of the spouse." *See* 29 U.S.C. § 1055(d)(1). Reading defendant's amended judgment of divorce and proposed DRO together and assuming for the purposes of the analysis of this subsection only that the term "survivor" in reference to defendant was used to mean "surviving spouse" in the context of a survivor annuity under ERISA, the period to which the DRO would apply is the time from which Samaroo would have become eligible to receive his benefits from the pension plan through the end of defendant's life. The period to which the benefits would apply is set forth by the terms of the proposed DRO and the amended judgment of divorce. Therefore, this Court finds subsection (C)(iii) to be satisfied by defendant's proposed DRO. The final. requirement of subsection (C) is that the proposed DRO specify each plan to which that order applies. *See* 29 U.S.C. § 1056(d)(3)(C)(iv). Defendant's proposed DRO meets this requirement as well. A plain reading of

defendant's proposed order discloses several references to the AT&T Management Pension Plan, or the acronym ATT-MPP, which all parties acknowledge as the same pension plan. This is the only plan mentioned in defendant's proposed DRO, and thus it is clear to which plan defendant's proposed order would apply. Thus, this subsection of the statute is satisfied.

Having determined that all four criteria set forth in subsection (C) have been satisfied by defendant's proposed DRO, this Court must next determine whether the proposed order meets the three requirements set forth in subsection (D). Satisfaction of these criteria would render defendant eligible for the payment of benefits from the plan. An analysis of these requirements leads the Court to conclude that defendant's proposed DRO fails to satisfy two of the three criteria, and thus defendant is ineligible to receive benefits under the plan.

Subsection (D)(i) states that a DRO satisfies the provisions of the statute only if the order "does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan." 29 U.S.C. § 1056(d)(3)(D)(i). Subsection (D)(ii) provides that a DRO will be "qualified" only if it does not require a pension plan "to provide increased benefits (determined.on the basis of actuarial value)." 29 U.S.C. § 1056(d)(3)(D)(ii). Defendant argues that since the ATT-MPP plan provides for the payment of annuities to surviving spouses of plan participants, and under ERISA a former spouse shall be treated as a surviving spouse to the extent provided in a QDRO, the plan would not be required, under the defendant's proposed DRO. to pay any type or form of benefit not otherwise provided under the plan, or to provide any

increased benefits.[5] Defendant's proposed DRO also provides, by explicit language to this effect, that

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[5] The United States District Court for the Southern District of New York, in addressing joint survivor annuities under ERISA, held that "[n]othing in ERISA's language can be reasonably interpreted to allow divorced wives the same right as spouses to compel the joint survivor annuity] option unless a QDRO had been issued. *Kohn v. Kohn*, 801 F.Supp. 1237, 1244 (S.D.N.Y. 1992), *aff'd*, 2 F.3d 403 (2d Cir. 1993). The district court further held that a party's spousal right to joint and survivor annuity, benefits pursuant to ERISA did not survive a judgment of divorce. *See id.* This language by the district court indicates that unless a QDRO has been entered to protect the position of the former spouse, making her status the equivalent of a surviving spouse for the payment of joint survivor annuity benefits, the former spouse does not have the same right to benefits as a surviving spouse.

Similarly, in *Dugan v. Clinton*, the United States District Court for the Northern District of Illinois found that when the pension plan participant died prior to reaching even the early retirement age, and thus never received any monthly benefits from the plan, the plan owed nothing to the participant. *See Dugan v. Clinton*, 1987 WL 11640, at *3 (N.D. Ill. May 22, 1987), The court further explained that the plan owed a pre-retirement survivor annuity to the participant's surviving spouse, but that the former spouse's only right was in the benefits to or received by the participant, pursuant to the language of the divorce judgment of the parties. *See id.* The language of the judgment provided that the payments due to the former spouse "shall be paid to her if, as and when" the participant received his benefits. *See id.* at *1. Since the participant never was and never could be entitled to the survivor annuity, the former spouse could not claim a right to any part of it. *See id.* at *3-*4. The district court found that directing the plan to pay benefits in the form of a survivor annuity to the former spouse would require the plan to provide a type of benefit not otherwise provided under the plan, in violation of ERISA. *See id.* at *4.

defendant is not requesting that the plan provide a type or form of benefits not otherwise provided under the plan or provide increased benefits. ATT-MPP counters, however, by stating that Samaroo's pension benefits terminated at the time of his death, and since the existing judgment of divorce at that time did not provide for defendant to receive any benefits from the plan, an order of this Court directing the plan to pay benefits to defendant, pursuant to the proposed DRO, would require the plan to pay benefits of a type or form not otherwise provided under the plan, or increased benefits, in contravention of the provisions of ERISA. Upon review of the terms of the plan under which Samaroo was covered, this Court finds that defendant's request does exactly what it purports not to do – to require the plan to provide either benefits not otherwise provided for by the plan or increased benefits.

The ATT-MPP plan provides that a participant who qualifies for a deferred vested pension is entitled to receive pension benefits upon reaching age 65, or alternatively upon reaching age 55 at an actuarially reduced amount, provided the participant had accrued 20 or more

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The language of the amended judgment of divorce in the case presently before this Court provides that Samaroo would pay defendant one half of the monthly amount he received "[a]t the time of [his] retirement and receipt of his pension," Robichaud Certif., Exh. I at 3.2(d)(1). In defendant's case, as in *Dugan*, Samaroo had to receive monthly pension benefits before defendant, as the former spouse, would be entitled to receive anything. Likewise, since Samaroo died prior to retirement and defendant is the former, and not the surviving, spouse, with no entitlement to benefits until Samaroo received his from the plan, the case at bar yields the same result as that reached in *Dugan*.

years of net credited service. *See* AT&T Management Pension Plan's Complaint for Declaratory Relief ("Compl.") ¶ 6. The plan also provides for a lifetime survivor annuity to a surviving spouse of a participant who qualified for a deferred vested pension and who died while still actively employed by AT&T Corp. *See* Compl. ¶ 7 and Exh. A § 4, ¶¶ 3(d), (e)(v). ATT-MPP's plan further provides that "[e]xcept as provided in this Paragraph 3(d), and in Subparagraph 3(e)(v), no pension payment shall be made to an annuitant of an employee if such employee dies prior to termination from service." *See* Compl., Exh. A. § 4, ¶ 3(d). Receipt of this annuity requires that the beneficiary be a surviving spouse and that the participant died prior to his retirement from AT&T Corporation. *See id.* Where a plan participant had 15 or more years of service at the time of his death, the annuity commences immediately upon the participant's death; otherwise, the annuity commences at the time the participant would have reached age 65, had he survived to that age.[6] *See* Compl. 17.

As previously set forth, defendant has now been deemed a "survivor" and "alternate payee" by the state

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[6] The plan further provides that where a participant has already retired and is receiving his deferred vested pension, a Deferred Vested Pension Joint and Survivor Annuity is provided to a surviving spouse. However, since Samaroo had not yet retired at the date of his death, and thus was not receiving his Deferred Vested Pension, this provision of the plan is inapplicable to the case before the Court.

court, since she procured a post-death amended judgment of divorce that, when incorporated into her proposed DRO, met the qualifications to be classified "qualified" under § 1056(d)(3)(C).

However, in light of the provisions of § 1056(d)(3)(D), defendant's proposed DRO is ineligible for treatment by this Court as a QDRO. Therefore, defendant is not entitled to benefits from the plan.

Section 1056(d)(3)(B)(i)(I) states that for a domestic relations order to be qualified, the order must relate to a benefit "payable with respect to a participant." The United States District Court for the Western District of Missouri, in *Bittiker v. Mo-Kan Teamsters Pension Fund*, discussed the difference between a pension plan participant being "entitled" to benefits under the plan and those benefits being "payable." *See Bittiker*, 1988 WL 52226, at *2 (W.D. Mo. Apr. 29, 1988). The court in *Bittiker* explained that since the decedent had earned the requisite number of years of service and pension credits, and had reached the minimum age required to be eligible for a deferred pension, he was "entitled" to benefits from the pension plan upon achieving the requisite years, credits and age. *See id.* The court held, however, that unless the decedent had reached the normal retirement age under his plan. or had completed all the requirements for an early retirement pension, his deferred pension was not "payable" under the terms of the plan. *See id.* The court therefore denied plaintiff, the decedent's widow, a joint

and survivor pension on the basis that the deferred pension had to be "payable" to qualify for a joint and survivor pension.[7] *See id.*

In addressing the scenario where a decedent-participant has both a surviving spouse and a former spouse alive at the time of his death, both of whom claimed benefits under the decedent's pension plan, the United States Court of Appeals for the Fourth Circuit, in *Hopkins v. AT&T Global Information Solutions Company*, held that surviving spouse benefits "vest in the participant's current spouse on the date the participant retires." *See Hopkins*, 105 F.3d 153, 156 (4th Cir. 1997) ("*Hopkins II*"). The Fourth Circuit explained that these benefits vest in a particular person on the date of retirement in order to allow the plan administrator to determine the amount of the monthly benefit payment by the plan. *See id.* at 156 & n.7. The disbursement of the plan benefits is based on actuarial computations, and thus the plan administrator must know, as of a date certain, what the obligations of the plan will be to a specific participant. *See id.* The Fourth Circuit, in affirming the district court, noted that a former spouse's interest in surviving spouse benefits

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[7] The United States Court of Appeals for the Seventh Circuit, in *Butler v. Encyclopedia Brillanica, Incorporated*, noted that "[e]very pension plan governed by ERISA must provide that if a vested participant in the plan dies before receiving benefits, a 'qualified preretirement survivor annuity shall be provided to the *surviving spouse* of such participant.' " 41 F.3d 285, 290 (7th Cir. 1994) (emphasis added) (citation omitted). Clearly, the statutory language provides for such a benefit to only a surviving spouse, and not one designated as an alternate payee.

under a plan can be protected by obtaining a QDRO prior to the participant's retirement. *See id.* at 157.

Previously in *Hopkins*, the district court explained that in the factual situation of that case, the amount of the annuity and monthly payments was computed based upon the participant's spouse at the time of his retirement, and that to change the recipient of the monthly annuity payment through the entry of a QDRO at some point in time after the plan administrator had determined, actuarially, the monthly payments would require increased benefits to be provided by the plan, which violates ERISA. *See Hopkins v. AT&T Global Info. Solutions Co.*, 914 F.Supp. 1362, 1365 (S.D. W. Va. 1996) ("*Hopkins I*"), *aff'd*, 105 F.3d 153 (4th Cir. 1997). The district court noted that prior to the participant's retirement, the interest in the surviving spouse benefit had not vested, and had a DRO been entered prior to retirement, it would have been "qualified" under ERISA and the participant could have changed the beneficiary of the surviving spouse benefit under the plan, since the monthly benefit payment had not yet been calculated and thus no increased benefits would have to be paid by the plan. *See id.* at 1364. The court held that "a state domestic relations order directing that a former spouse be designated as the surviving spouse for purposes of a participant's ERISA-qualified pension benefit is not a QDRO within the meaning of ERISA and REA if the order is entered after the surviving spouse benefit vests in another beneficiary upon the participant's retirement." *Id.* at 1365.

The Fourth Circuit also noted in *Hopkins II* that a former spouse can obtain an interest in a participant's

pension benefits by obtaining a QDRO at anytime; however, this statement applies to the situation where a QDRO is sought and entered to obtain part of the funds being paid to the participant following his retirement. In that instance, the plan administrator has already determined the actuarial amount to be paid monthly to the retired participant. Thus, the QDRO in that situation has no effect on the plan, only on the participant, and thus does not require the plan to pay increased benefits. However, in the case presently before this Court, defendant's proposed DRO would require increased benefits from the plan, rendering this section of the Fourth Circuit's opinion inapplicable to the case at bar.[8]

Defendant asserts that even if the Court were to find her DRO qualified and enforceable, and thus require the plan to pay benefits to her, the plan would not have to provide any type or form of benefit not otherwise provided for under the plan, nor would it have to provide

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[8] In *Ross v. Ross*, the New Jersey Superior Court, Appellate Division, held that where a QDRO which would allow pension plan proceeds to be alienated under ERISA was not entered prior to the plan participant's death, the required beneficiary change to a specified plan was not properly made. *See Ross v. Ross*, 308 N.J. Super. 132, 157 (App. Div. 1998). The Appellate Division also stated that "New Jersey's concepts of equity cannot be applied and a QDRO cannot be entered after the fact." *Id.* at 159. The *Ross* court further noted that "where a surviving spouse has not waived her right to benefits and a QDRO does not exist, ERISA prevents a participant from naming a beneficiary other than a surviving spouse. In that case, a participant will be unable to alienate any of his or her pension plans, even by distribution in a [property settlement agreement]." *Id.* at 151 (citation omitted).

increased benefits. The Court finds this argument to be erroneous. The terms of the plan provide that Samaroo, with his years of service with AT&T, was not entitled to any benefits under the plan at the time of his death. *See* Compl. 16. He was not entitled to his pension benefits until he reached the age of 65, or once he reached age 55 provided he had accrued 20 or more years of net credited service. *See id.* Samaroo died while still actively employed, and prior to being eligible for any benefits under the plan. Thus, at the date of his death, he was not entitled to any benefits from the plan, and the obligation of the plan to provide any benefits to him ceased on the date of his death. For the plan to now be required to pay Samaroo's pension benefits, at a reduced percentage, to defendant, would require the plan to pay a type or form of benefit not otherwise provided under the plan. Furthermore, such an obligation on the plan would increase the benefits the plan is obligated to provide to Samaroo.

In the matter before this Court, defendant's proposed DRO fails to meet the requirements to be "qualified" under ERISA, and thus defendant is not entitled to the payment of any benefits by ATT-MPP. The entry of a QDRO for defendant at this time would require the payment of increased benefits from the plan, which violates ERISA. The instant situation is not one in which Samaroo retired, ATT-MPP made an actuarial determination as to what his monthly pension benefits would be, and now defendant is attempting to receive a portion of that amount. Rather, Samaroo's death provided the point in time at which the plan administrator had to make a determination as to the monthly obligation of the plan to Samaroo or any surviving spouse or designated alternate

payee. At that time, no QDRO had been entered with the plan by defendant, nor did Samaroo have a surviving spouse. Thus, the plan administrator made the determination that the plan had no obligation to Samaroo. To borrow the analysis of the district court in *Bittiker*, although Samaroo was eligible for and "entitled" to benefits from the plan, such benefits were not yet "payable" at the time of his death. For defendant in this action to receive any benefits from ATT-MPP, the benefits must have been payable at the time of Samaroo's death. They were not. Therefore, defendant is not entitled to any benefits from ATT-MPP in this matter.

Additionally, in the property settlement originally reached by Samaroo and defendant, Samaroo agreed that he would pay defendant one half of the monthly amount he received as his pension at the time of his retirement "and receipt of his pension." *See* Robichaud Certif. ¶ & Exh. 1. The Chancery Division concluded that Samaroo would have given to defendant the right of survivorship for up to 50% of his pension under the ATT-MPP plan, "to the extent that there were any benefits" available. *See* Robichaud Certif., Exh. 12. However, Samaroo's death prior to his retirement foreclosed the receipt of any benefits from the ATT-MPP plan, pursuant to the terms of the pension plan applicable to him. Thus, by the terms of the settlement agreement between defendant and Samaroo, defendant is not entitled to any benefits. Furthermore, the Chancery Division's determination makes any payment of benefits to defendant by the plan contingent on the availability of such benefits. This Court has determined that since defendant did not enter a QDRO with the plan prior to Samaroo's death, the plan accurately determined

at the time of his death that it had no obligation to Samaroo. Therefore, there are no benefits available for defendant under the plan, and requiring any payment of benefits by the plan at this late date would be violative of ERISA. Accordingly, this Court will deny defendant's motion for summary judgment and grant plaintiff's motion for summary judgment.

III. CONCLUSION

For the foregoing reasons, this Court will deny defendant Louise M. Robichaud's motion for summary judgment, or in the alternative, to dismiss plaintiff's complaint for declaratory relief and will grant plaintiff AT&T Management Pension Plan's motion for summary judgment. An appropriate form of Order is filed herewith.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

AT&T MANAGEMENT PENSION PLAN, Plaintiff, v. LOUISE M. ROBICHAUD, Defendant.	Civ. No. 89-2215(GEB)
LOUISE ROBICHAUD SAMAROO, Plaintiff, v. WINSTON R. SAMAROO, Defendant.	Civ. No. 89-2216(GEB) **ORDER** (Filed Apr. 21, 1998)

For the reasons set forth in the Memorandum Opinion filed this date in the above-captioned matter,

IT IS this 20th day of April, 1998;

ORDERED that defendant Loiuse [sic] M. Robichaud's motion for summary judgment, or in the alternative to dismiss, be and hereby is DENIED; and it is further

ORDERED that plaintiff AT&T Management Pension Plan's motion for summary judgment on its complaint for declaratory relief be and hereby is GRANTED.

/s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

Louise Robichaud Samaroo
One Palmer Square
P. O. Box 627
Princeton, New Jersey 08542
(609) 921-6336
Attorney Pro Se

LOUISE ROBICHAUD SAMAROO Plaintiff Pro Se	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION FAMILY PART
vs.	:	MERCER COUNTY
WINSTON R. SAMAROO, Defendant Pro Se	:	DOCKET NO. FM-07705-85 Civil Action FINAL JUDGMENT OF DIVORCE

This matter coming on to be heard in the presence of Louise Robichaud Samaroo, Plaintiff Pro Se, and no one appearing for the Defendant; and the Court having heard and considered the Complaint and proofs; and it appearing that the Plaintiff and Defendant were married; and the Plaintiff having pleaded a cause of action for divorce under the Statute in such case made and provided, and the Plaintiff having been a bona fide resident of this State for more than one year next preceeding [sic] the commencement of this action; and jurisdiction having been acquired over the Defendant by personal service pursuant to the Rules governing the Courts; and it appearing from Plaintiff's testimony that all assets acquired during the marriage have been equitably distributed between the parties to their mutual satisfaction;

IT IS on this 25th day of October, 1984,

ORDERED, that pursuant to the Statute in such case made and provided, the marriage between the parties be and is hereby dissolved; and it is

FURTHER ORDERED, that the parties faithfully abide by the terms of an Agreement between them dated March 30, 1983, a duplicate copy of which is hereby attached which the Court has determined that the parties have agreed to be just and reasonable under the existing circumstances. This Agreement shall be incorporated into this Judgment but shall not merge with same. It is expressly understood that the Court took no testimony and did not pass on the merits of said Agreement; and it is

FURTHER ORDERED, that Plaintiff is permitted to resume her maiden name of ROBICHAUD.

/s/ Samuel D. Lenox, Jr.
Samuel D. Lenox, Jr., A.J.S.C.

Consent is hereby given to
the foregoing Judgment of
Divorce as to all issues except
divorce, and as to the issue of divorce,
consent is hereby given as to form.

/s/ Louise Robichaud Samaroo
Louise Robichaud Samaroo
Plaintiff Pro Se

/s/ Winston R. Samaroo
Winston R. Samaroo
Defendant Pro Se

Separation Agreement

THIS AGREEMENT, made and entered into this [30th] day of ~~February~~ [March] 1983, by [/s/ wls lms] between Louise M. Samaroo, residing at 203 Bertrand Drive, Princeton, NJ, hereinafter referred to as the "wife," and Winston R. Samaroo, residing at 28-14 Pheasant Hollow Drive, Plainsboro, NJ, hereinafter referred to as the "husband."

WITNESSETH:

Whereas, husband and wife were married to each other on the 26th day of May, 1962, in the City of Ottawa, Province of Ontario, Canada by a priest at Sacre Coeur Catholic Church, and

Whereas, there were three children born of the marriage, to wit: Julie C. Samaroo, born Aug. 15, 1964; Michele L. Samaroo, born Oct. 10, 1965; and Stephanie E. Samaroo, born March 11, 1970, and

Whereas, by reasons of certain disputes and irreconcilable differences between them, husband and wife are and have been living separate and apart since September 7, 1982, and

Whereas, the parties desire to settle all questions concerning their property rights, custody and support, and any and all other rights and obligations growing out of the marriage relationship;

Now, THEREFORE, for and in consideration of the mutual covenants, promises and undertakings hereinafter set forth and of the acts to be performed by each party for the benefit of the other, the parties agree as follows:

ARTICLE 1: SEPARATION

1.1 *Separation.* The parties shall at all times live separate and apart from each other. Each shall be free from interference and authority and control, directly or indirectly, by the other as fully as if he or she were single and unmarried.

1.2 *Employment and residence.* Each party may, for his.or her separate benefit, engage in any employment, business or profession he or she may choose.

Except as hereinafter may be provided, each party may reside at such a place, or places as he or she may elect.

1.3 *Non-molestation.* The parties shall not molest, harass, disturb, annoy, malign or interfere with each other, nor shall either attempt to compel the other to cohabit or dwell with him or her by any means whatsoever.

ARTICLE 2: CUSTODY

2.1 *Custody and visitation.* Custody of the children of the marriage shall be joint and either party shall be considered to be a primary custodial party in the event of emergency. Although custody shall be joint, the children will remain together and live at 203 Bertrand Drive with whichever of the parties reside therein. Both parties will cooperate with each other in effectvating [sic] liberal visitation with the children by the more custodial party subject to the needs and schedules of the children and reasonable notice of such visitation. The rights of visitation extends to visits away from the childrens home as well as home visits.

2.2 *Welfare of the children.* Both parties shall conduct themselves in a manner consistent with the best

interests of the children and neither party shall do anything to diminish the natural affection that exists between each of them and the children. Each party agrees to communicate freely and openly with the other party concerning the health, educational needs, and welfare of the children.

ARTICLE 3: PROPERTY

3.1 *Realty*

(a) Ownership. The parties currently own as tenants in common three parcels, to wit:

203 Bertrand Drive, Princeton, NJ
50 Main Street, Kingston, NJ and
221 West First Street, Ocean Isle Beach, NC

It is hereby agreed that each party shall retain his or her respective ownership in these properties.

(b) Use and occupancy. As long as both parties retain their respective ownership in the properties:

(1) 50 Main Street – This property shall be offered for rent to persons and at terms which must be agreed upon by both parties. All income, expenses and liabilities relating to the ownership and operation of the premises shall be shared by the parties and all decisions relating to the maintenance and operation of the premises shall be made jointly. Any party making a unilateral decisions relating to any expenses, except in case of emergency, shall be solely responsible for the cost therefore.

(2) 221 West First Street – Except as hereinafter provided, this property shall be offered for rent and operated under the same terms as stated

for 50 Main Street. The parties agree that as long as owned by both parties, each party shall be allowed one week per year, rent-free in-season use of this property for themselves, their friends or relatives. Further, during the period from November through April inclusive, either party may personally or with guests use the property rent-free. In addition, the children of the marriage, upon agreement of both parties may use the property rent-free. Any further usage by either party shall be at the then going rental rate, less realtors commission.

(3) 203 Bertrand Drive – (i) This property shall be retained for the use and occupancy of the children and the party then having custody of the children.

(ii) The expenses and cost for the mortgage, real estate taxes, fire and liability insurance (excluding household goods) repairs, lawn care, water, pool mortgage and pool chemicals shall be shared equally by the parties. Gas for the pool and the main telephone shall be paid by the party occupying the premises. Gas for heating the house, electricity and the children's phone shall be paid in accordance with Formula 1 hereinafter set forth.

(iii) Except in the case of an emergency repairs or alterations exceeding $50.00 in cost shall be agreed to by both parties before any such expense is incurred. Any party making a unilateral decision shall be solely responsible for such costs and expenses. Otherwise, when agreed to, the costs and expenses for repairs shall be shared by the parties.

(iv) Effective November 1, 1983, the obligation of the party not occupying the premises shall be

reduced by half the rental cost of a one bedroom apartment plus heat, gas and electricity. The apartment should be comparable in cost to a similar apartment at Princeton Meadows, Plainsboro, NJ and be occupied solely by such party. For each month's calculations the preceding month's expenses shall be used. Notwithstanding, the aforesaid effective date, at any time that a third party moves into the house with the party occupying the house, then the party not occupying the house shall deduct from his or her share of the expenses, half the rental value of the property. This shall be in lieu of half the cost of an apartment for periods subsequent to November 1, 1983.

(v) The wife shall have the option until November 1, 1987 to purchase the husband's interest in the property at 203 Bertrand Drive at the fair market value of the property at the time of purchase as may be agreed upon by the parties or in the event no agreement is reached, as determined by the middle value of three appraisals. Appraisers shall be agreed to by both parties. Husband's interest is defined as the market value less the balances then due on the presently outstanding mortgages and 2¼% of the market value. However, in the event wife resells the property within 5 years from exercising her option to purchase without the services of a realtor or where no commission is paid, then husband shall be reimbursed the 2¼% reduction plus interest at 10% per annum.

c. Sale – (1) In the event either party wishes to sell his or her interest in the 50 Main Street or 221 West First Street properties, such party shall first offer the property to the other party by

written notice at whatever price shall be offered to others. If the other party elects not to purchase or fails to make an election within 30 days after receipt of the notice, then the parties agree that such property shall be listed for sale at a price at least twice the interspousal offering price with a reputable real estate broker to be agreed upon by the parties. In the event the party first desiring to sell agrees to a sale price lower than the original offering price, the other parties first option shall be revived at such lower price. It is understood that while the term "price" as used above refers to the total price, the actual cost to the purchasing spouse will be reduced by the principal balance of the remaining mortgage, usual costs and expenses of the transfer and then ½ interest in the property.

(2) Subject to wife's option to purchase the 203 Bertrand Drive property as set forth herein (3.1(b)(5)), the Bertrand Drive property shall not be sold until the youngest child is emancipated unless otherwise agreed to by both parties. Thereafter, either such party may offer the property for sale to the other party in the same manner and under the same terms and conditions as set forth in 3.1(c)(1), supra.

3.2 *Personal Property.* (a) Jewelry – Each party shall retain ownership of his or her own jewelry.

(b) Household goods – The party not occupying the Bertrand Drive house is entitled to take the two blue sofas, one TV, one painting of his or her choice, a coffee table, the respective woman's or man's dressers. The painting of a nude shall belong to the husband. All other

tangible personal property not otherwise provided for herein shall be divided amicably by and between the parties.

(c) Automobiles – (1) Husband shall retain ownership of the 1981 Lincoln and shall be solely responsible for the payment of all expenses and obligations associated therewith. More specifically, husband shall pay the Credit Union and Princeton Bank loans totalling about $13,000 and taken for purchase of the auto.

(2) Husband shall convey to the wife all his right, title and interest in the 1971 Jaguar XJ6. Wife shall assume all responsibilities and expenses associated with the ownership and operation of said car.

(3) Expenses for maintaining the 1975 Plymouth Station Wagon shall be borne by the husband.

(d) Pensions, Profit Sharing and Bell System Savings Plan – (I) Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 dollars per month. At the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount.

(2) Wife presently is vested in a profit sharing plan with the firm of Smith, Cook, Lambert and Miller. Upon leaving the firm or any sooner distribution of such funds, the present value of which is $8,000, wife agrees to pay to husband one half the then current value thereof.

(3) Proceeds of the Bell System Savings Plan for the years 1983 and 11/12 of 1984 shall be shared equally between the parties. Thereafter,

all future proceeds shall belong solely to the husband.

(e) Other property. The parties agree to give each of the three children one silver bar presently in the possession of the parties.

ARTICLE 4: SUPPORT AND MAINTENANCE

4.1 *Support and alimony.* The parties hereby mutually waive for now any claim for alimony or support and maintenance for themselves from the other party, except in the event that either party should become disabled, the issue of alimony shall be renegotiated.

4.2 *Child support.* All expenses associated with the children shall be shared according to Formula 1. Any unusual, extraordinary or major expenses associated with the children shall be agreed to by both parties. Except in the case of emergencies, any party making a unilateral decision related to such unusual, extraordinary or major expenses shall be responsible for the payment thereof in their entirety.

4.3 *Medical and dental expenses.* Prior to divorce, those portions of any medical, hospitalization, dental and eye care covered by and reimbursed under Western Electric's benefits plans shall be the responsibility of the husband. All unreimbursed expenses for the children shall be paid according to Formula 1. In the event of divorce and to the extent of unreimbursed expenses for the wife prior to divorce, such expenses for the wife shall be her own responsibility.

ARTICLE 5: DEBTS AND OBLIGATIONS

5.1 *Responsibility for past due obligations.* Unless otherwise provided for herein, the parties shall share equally in any debts incurred prior to December 1,

1982, including but not limited to wife's student loan.

Except as herein provided, the parties represent and agree that since December 1, 1982 neither has incurred nor shall incur any debt, or make or enter into any transaction that has or will bind the other directly or indirectly, unless provided for in this agreement. Each party agrees to hold the other harmless and to indemnify the other against the payment of any monies and obligations or expenses in connection therewith which the party shall be obligated to pay to third parties by virtue of any party's failure to comply with the terms of this paragraph, including reasonable counsel fees and disbursements.

5.2 *Income tax returns.* The parties represent that neither of them has filed federal or state income tax returns for the year 1982. At the parties election, which election shall be made no later than sixty days from the execution hereof, the parties shall execute joint federal and state tax returns for that year. Any net additional assessment of taxes, interest or penalties, shall be divided by the parties in the same percentages as their respective incomes are a percentage of their total incomes as provided in Formula 1. Any refunds shall be divided equally.

5.3 *Life insurance.* There presently exists life insurance on the life of the husband through husband's employer which is comprised of a basic portion paid by the employer and a supplemental portion payment for which is deducted from husband's earnings. This insurance has been irrevocably assigned to the wife. Husband hereby agrees to continue to allow payroll deductions to maintain the supplemental insurance. Wife agrees, after any divorce, to

reimburse husband for the cost of such supplemental insurance and for any tax liability on the basic portion of the insurance.

ARTICLE 6: WAIVER OF CLAIMS

6.1 *Knowledge of facts.* The parties acknowledge that each has produced, during the course of the negotiations leading to the execution of the within agreement, financial statements, records, and other documentation pertaining to his or her financial status, income, expenses, assets and liabilities. Each party represents to the other the completeness, truthfulness, and accuracy of said data, with the understanding that the other party is relying thereon in accepting the terms of the settlement contained herein and execution of the within agreement.

6.2 *Independent counsel.* The parties each acknowledge that they have had the opportunity to be advised by or to retain separate and independent counsel of their own choosing and that they have been separately and independently advised regarding every aspect of this agreement. They acknowledge that the other party has in no sense participated in the selection of their individual counsel.

6.3 *Voluntary execution.* The parties each acknowledge and represent that this agreement has been executed by them, and each of them, free from persuasion, fraud, undue influence, or economic, physical, or emotional duress of any kind whatsoever exerted by the other or by other persons.

6.4 *Entire agreement.* This agreement constitutes the entire understandings between the parties and they each represent that there have been no representations, warranties, covenants or undertakings other than those as set forth herein.

6.5 *Waiver of property rights.* Except as herein to the contrary provided, each party may dispose of his or her property in any way, and each hereby waives and relinquishes any and all right he or she may now have or hereafter acquire, under the present or future laws of any jurisdiction to share in the property or the estate of the other party as a result of the marital relationship including, but not limited to, equitable distribution of property pursuant to N.J.S.A. 2A:34-23 or other similar statutory rights, dower, curtesy, statutory allowances, widow allowance, homestead rights, or rights under N.J.S.A. 3A:35-5, right to take against any last will and testament of the other, except the right to take if and where named as a beneficiary and the right to act as executor or executrix of the other's estate if so named in any will now existing of hereinafter made by either party shall not be waived. Further, there shall be no waiver of any rights or claims as a named beneficiary under any existing or future policies of insurance.

6.6 *General mutual releases.* Except as herein to the contrary provided, the husband and wife hereby mutually remise, release and forever discharge each other from any and all actions, suits, debts and claims, demands and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or may hereafter have against the other upon or by reason of any matter, cause or thing up to the date of the execution of this agreement, it being the intention of the parties that henceforth there shall be as between them only such rights and obligations as are specifically provided in this agreement.

ARTICLE 7: JUDICIAL PROCEEDINGS

7.1 *Non-collusive agreement.* It is expressly understood. that, notwithstanding the provisions hereof, there have been no collusive agreements whatsoever made either orally or in writing, or any representations by one party or the other with respect to the procurement of a divorce, or restraining or inhibiting the other from contesting or litigating any proceedings now pending or which may be instituted one against the other in any matrimonial action at any time.

7.2 *Incorporation of the within agreement.* This agreement shall be offered in evidence in any proceedings instituted by either of the parties in any court of competent jurisdiction in which a termination of the marriage by way of divorce, annulment of [sic] otherwise is sought, and shall, subject to the approval of the court, be incorporated in any judgment rendered in that action.

7.3 *Non-merger.* Notwithstanding its incorporation in conformity with Paragraph 7.2 into a judgment terminating the marriage, entered by a court of competent jurisdiction, the provisions of this agreement shall not merge with, but shall survive such judgment in its entirety, in full force and effect, except as may be invalidated by a court of competent jurisdiction in accordance with Paragraph 7.4 hereof.

7.4 *Severability.* Should any provision of this agreement be held invalid or unenforceable by any court of competent jurisdiction, all other provisions shall, nonetheless, continue in full force and effect, to the extent that the remaining provisions are fair, just and equitable.

7.5 *Modification or waiver.* No modification of [sic] waiver of any of the terms of this agreement shall be valid unless in writing and executed by the party to

be charged. The failure of either party to insist upon strict performance of any of the provisions of this agreement shall not be deemed a waiver of any subsequent breach or default of any provision contained in this agreement.

ARTICLE 8: ADMINISTRATION AND FORMULA

8.1 *Initial fund.* The parties hereto shall each contribute the sum of $2,000 upon the signing hereof to create an initial fund from which joint expenses are to be paid. The fund shall be placed in an account allowing either party to withdraw therefrom.

8.2 *Administrator.* The party who at any given time resides at 203 Bertrand Drive shall be the administrator of the fund and shall keep all records relating thereto.

8.3 *Accounting and payment.* The administrator shall submit a detailed bill and accounting to the other party once per month. Both parties shall pay their respective shares to the fund within 10 days of submission of the bill. Said other party shall have the right to examine all records to confirm any such bill or accounting.

8.4 *Formula 1.*

Husband (H) pays

$$\frac{\text{Net income of H}}{\text{Net income of H + Net income of W}} \times \text{applicable expenses}$$

Wife (W) pays

$$\frac{\text{Net income of W}}{\text{Net income of H + Net income of W}} \times \text{applicable expenses}$$

Net income shall be the taxable income as calculated for federal income tax assuming that each party uses

"head of household" status, that deductions for real properties, loans and mortgages are based on existing properties loans and mortgages, that deductions associated with the primary jobs are allowed and that losses from new ventures and businesses are not allowed.

ARTICLE 9: GENERAL PROVISIONS

9.1 *Counsel fees.* Each party shall pay for his or her own counsel fees in connection with the negotiation, preparation, review and execution of the within agreement and for any legal services rendered to either party in connection with the subsequent entry of a judgment terminating the marriage by a court of competent jurisdiction.

Should either party fail to abide by the terms of this agreement, then the defaulting party will indemnify and hold the other harmless for all reasonable expenses and costs, including attorney's fees and disbursements, incurred in successfully enforcing this agreement, or asserting or defending his or her rights hereunder as against the other party or third parties.

9.2 *Change of residence.* As long as any provision contained herein remains executory, each party shall keep the other informed of his or her residence and telephone number or such other place as he or she may readily receive communications, informing the other of any change of such residency or place of communication within five days of the actual change thereof.

9.3 *Further documents.* The parties each respectively agree that he or she will, at any time hereafter, on request, make execute and deliver any and all deeds, releases, waivers, and other instruments, papers or

documents as the other party may reasonably require for the purpose of giving full effect to the covenants, provisions, promises and terms contained within this agreement, including but not limited to any documents specifically provided for herein.

9.4 *Situs.* The laws of the State of New Jersey shall govern the execution and enforcement of the within agreement.

9.5 *Original agreements.* This agreement shall be executed in four (4) counterparts, two for each party, and each counterpart shall be the agreement with the same effect as any other counterpart.

9.6 *Survivorship.* This agreement shall inure to the benefit of both parties, their heirs and assigns forever.

9.7 *Headings.* The headings of the several subdivisions and paragraphs of this agreement are inserted solely for the convenience of reference and shall have no further meaning, force or affect. [sic]

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year written below their names.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

/s/ Joel F. Spivak
JOEL F. SPIVAK
As to Winston R. Samaroo

/s/ Winston R. Samaroo
WINSTON R. SAMAROO
Dated: February 22, 1983

/s/ Edith J. Rose
As to Louise M. Samaroo

/s/ Louise M. Samaroo
LOUISE M. SAMAROO
Dated: ~~February 22, 1983~~
March 30, 1983

State of New Jersey :
: SS.
County of Mercer :

BE IT REMEMBERED, that on this 22nd day of February, 1983, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared Winston R. Samaroo, who, I am satisfied, is the person named in and who executed the within instrument, and thereupon he acknowledge that he signed, sealed and delivered the same as his own voluntary act and deed for the uses and purposes therein expressed.

/s/ Joel F. Spivak
JOEL F. SPIVAK

An Attorney at Law of New Jersey

State of New Jersey :
: SS.
County of Mercer :

BE IT REMEMBERED, that on this ~~22nd~~ 30th day of ~~February~~ March, 1983, before me, the subscriber, an Attorney at Law of New Jersey, personally appeared Louise R. Samaroo, who, I am satisfied, is the person named in and who executed the within instrument, and thereupon she acknowledge that she signed, sealed and delivered the same as how [sic] own voluntary act and deed for the uses and purposes therein expressed.

/s/ Edith S. Rose
An Attorney at Law of
New Jersey

LOUISE M. ROBICHAUD, ESQUIRE
Counselor At Law
50 Main Street
Post Office Box 166
Kingston, New Jersey 08528
(609) 924-9699
PLAINTIFF PRO SE

LOUISE ROBICHAUD SAMAROO,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff	:	CHANCERY DIVISION FAMILY PART
vs.	:	MERCER COUNTY
WINSTON R. SAMAROO,	:	DOCKET NO. FM-07705-85
Defendant	:	Civil Action
	:	ORDER
	:	(Filed Nov. 5, 1990)

This matter being opened to the Court by a Motion filed by Louise Robichaud Samaroo, Esquire, Plaintiff *Pro Se* appearing, and a Cross Motion having been filed by Collier, Jacob & Sweet, P.C., attorneys for the AT&T Management Pension Plan ("AT&T-MPP"), Robert F. Guida, Esquire appearing; and the Court having reviewed the pleadings filed and having entertained oral arguments on October 12, 1990; and for good cause shown;

IT IS on this 5th day of November, 1990,

ORDERED, that AT&T-MPP's Cross Motion to intervene in the within matter pursuant to R. 4:33 is granted; and it is

FURTHER ORDERED, that Plaintiff and the intervening party, AT&T-MPP, shall have sixty (60) days from the within Order to exchange discovery; and it is

FURTHER ORDERED, thadt [sic] at the conclusion of the discovery period, the matter shall be rescheduled for a hearing.

/s/ _____
Philip S. Carchman, P.J.F.P.

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – FAMILY PART
SOMERSET COUNTY
DOCKET NO. FM-18-454-96

LOUISE ROBICHAUD,	:	
Plaintiff,	:	TRANSCRIPT
v.	:	OF
WINSTON SAMAROO,	:	TRIAL
Defendant.	:	
----------	:	

Place: Somerset County
Courthouse
Bridge and Main Streets
Somerville, NJ 08876

Date: June 26, 1996

BEFORE:

HONORABLE THOMAS H. DILTS, J.S.C.

TRANSCRIPT ORDERED BY:

LOUISE M. ROBICHAUD, ESQ.

APPEARANCES:

LOUISE M. ROBICHAUD, ESQ.
Plaintiff Pro se.

CHRSITOPHER H. MILLS, ESQ. (Collier, Jacob & Mills)
Attorney for Intervenor.

Transcriber Barbara A.
Cardenuto
10 Prospect Hill, Apt. 1-A
Flemington, NJ 08822-1333
(908) 782-1526

Sound Recording
Operator: Ingelore M. Krug

* * *

[p. 45] Summation – Mr. Mills

THE COURT: Okay. Ms. Robichaud?

MS. ROBICHAUD: The Same thing, Judge.

THE COURT: Same amount of time? Very good. Thank you. If you'll stand, I'll be happy to hear your closing argument, Mr. Mills. She has the burden of proof, so you have to go first.

MR. MILLS: Yes. Your Honor, as intervenor, the Pension Plan is not here to argue pro or con as to what the decedent's intent might have been, but simply to point out as we did in our brief that we believe the standard by which you must decide whether there was an intent was clear and convincing.

We also brought before this Court a number of legal arguments as to whether the Court either has the authority or should exercise its equitable jurisdiction to enter the relief which is requested in the proceeding.

First, as we argued in our brief, and as I think the testimony clarified today, there is no justiciable controversy here. The cases require that there be a true adversarial nature and a controversy of interest. The estate has long since been closed, there are no assets in the estate.

To the extent that the estate has been represented, it's clear that the estate's legal fees are being defrayed by the plaintiff in the [p. 46] matter. We suggest that all of these facts as revealed today go to support our point that this is not a true justiciable controversy.

We next suggest that the cases we cited from other jurisdictions, from Illinois, Tennessee, Texas and Michigan, all indicate that this kind of situation is not unique, is not unheard of, and, more to the point, it is not absolutely unconscionable in the minds of other Courts which have addressed this for a separation agreement containing the kind of language that is present in Paragraph 3.2(d) of the plaintiff's separation agreement to result in a situation in which the premature death of a pension plan participant results in the divorcing spouse receiving nothing, because that is precisely what the language of Paragraph 3.2(d) yielded.

And in RAY NORFLEET, MAXWELL v MAXWELL, PATE v PATE in Texas, and most specifically the ROTH v ROTH case in Michigan, most of these cases, three of them, the Illinois, Tennessee and Texas case, all stand for the proposition that when Courts have considered whether they have the authority to grant nunc pro tunc relief back to a time pre-REA, a period long since after the entry of the divorce decree and the property settlement, they have concluded that it is improper for [p. 47] a court of equity, a family court, to grant relief nunc pro tunc for the reason that nunc pro tunc relief is available and is to be used to correct errors of court, not to correct errors of litigants or of attorneys, because using nunc pro tunc relief, you are not to disturb the status of a party.

Here the status of a party would be disturbed, it would be changed. Ms. Robichaud admits that under the current language of Paragraph 3.2(d) she does not have survivor rights, and that this was the factor on which the Management Pension Plan, in her view, and according to the letter she has submitted, hung its decision that she had at the outset no rights under the plan.

Therefore what she seeks to do is have this Court change the status of the parties, when in fact the order was entered accurately and it reflected the intent, or at least the informed intent at the time of the parties.

As we have pointed out, and as Ms. Robichaud admitted, she could not have secured a QDRO at the time that either her property settlement agreement was entered or that her divorce decree was entered because prior to January 1st, '85, any order that purported to address the plan and to require that the plan recognize [p. 48] survivorship rights in an individual was simply null and void.

The best that Mr. Samaroo and Ms. Robichaud could have done for themselves in 1983 or in 1984 is, as we pointed out in our brief, precisely what they secured and what the did in Paragraph 3.2(d), and that was to provide that if, as and when Mr. Samaroo reached retirement age, that he was obligated to pay 50 percent of his pension to is ex-wife. That was an understood, common provision in property settlement agreements, it was the best they could have done. And there was no mutual mistake, there was no oversight or inadvertence by the Court, therefore, nunc pro tunc is inappropriate.

Now, in various certifications Ms. Robichaud has contended that this Court should reform her divorce judgment because it was as a result of mutual mistake. We submit that the case of ROTH v ROTH out of Michigan and the Michigan Court of Appeals takes that argument head on, and for the reasons in that case, we submit it would be inappropriate for this Court to do it.

But more to the point, again, there was no mutual mistake in 1983 because the parties did the best for each other that they could have done under the time. As the testimony indicated today, Ms. Robichaud [p. 49] indicates that the last sentence 3.2(d), the if, as and when received language, is language with which she was familiar, which she used even after the effective date of the Retirement Equity Act.

So, what we're left with in support of Ms. Robichaud's claim of mutual mistake is the mistake that no one anticipated at the time the contingency that Mr. Samaroo would die at some point, or would die before he reached retirement age. That's in Ms. Robichaud's certification which is attached to our brief.

And we submit that is not the kind of mutual mistake which is contemplated by the case law and by the statutes, and in any event, it's certainly not the kind of mutual mistake, or the kind of misunderstanding, misapprehension, which should justify this Court in exercising its equitable jurisdiction.

Given the fact that we have as a plaintiff appearing pro se a matrimonial lawyer, who above all other people should know how much more effective an order against the plan is than an order against an individual eight years

her senior who undoubtedly, according to the actuarial tables would be scheduled, or envisioned actuarially to die before she did.

Finally, we suggest that the relief requested is barred by Rule 4:50-2 and by the doctrine of equi- [p. 50] table estoppel. Ms. Robichaud has argued that she's entitled to such relief because there was a mistake in the drafting of or the entry of their separation agreement and Judgment of Divorce.

The doctrine of mistake is addressed in the provision of 4:50-2, which carries a one-year statute of limitations. While Ms. Robichaud may contend that she should fall into the catch-all Section (f), her papers all contend that it simply was a mistake, there was either a mutual mistake, a mistake at the time, but none of these apply and none of these justify excepting the one-year provision.

One year, within one year after the entry of Ms. Robichaud's divorce the Retirement Equity Act had passed. Ms. Robichaud has indicated that within that time period she had attended ICLE seminars in which she was becoming familiar with the complexities of and the use of the Retirement Equity Act to enter QDRO's. She may never have written QDRO's, but she certainly within that one-year time period knew of the need to do so, or the availability of this new tool to secure direct payment from plan participants under QDRO's. She didn't do it in the one-year period.

Nor did she do it any time prior to the time her ex-spouse died, despite the fact that she by that [p. 51] time was engaging in a 50 percent practice of matrimonial law and considered herself fully familiar with the law. We

submit that the law, on those facts, there is no basis for the Court to exercise its equitable judgment.

Finally, we suggest that the history of this litigation, having been filed some eight years ago and allowed to lapse by the movant for three years in Mercer and for a year and a half in Somerset, is indicative of a litigant who is not entitled to extraordinary relief or to the extraordinary exercise of this Court's equitable powers.

For those reasons, we suggest that the relief requested should be denied.

THE COURT: Before you sit down, I have a couple of questions. I didn't want to interrupt your closing argument.

Is there at the present time a federal case pending?

MR. MILLS: It was administratively dismissed, but it's still – Judge Brown retained jurisdiction.

THE COURT: And what is the question to be dealt with by the federal court if this matter is reinstated? What's the federal question that Judge Brown will be deciding?

[p. 52] Colloquy

MR. MILLS: If I were to say whether under ERISA the Management Pension Plan is obligated to accept any order that you might enter nunc pro tunc, that's very broad, there are some subparts to that.

THE COURT: No, but that doesn't surprise me, the language that you've chosen, that's what I sensed was the proper question. And I sensed that it was stayed or, I

though it was stayed, the federal action, to allow, to have a real case in controversy, because right now it's not real until a state court judge determines what the judgment should look like.

And if the state court determines that the judgment should look the way Ms. Robichaud wants it, then at least there will be a real case in controversy for the federal court to rule on. Does that make sense, that analysis –

MR. MILLS: That's correct, your Honor.

THE COURT: – case in controversy?

MR. MILLS: I think I see it that way.

THE COURT: Okay.

MR. MILLS: We'll certainly be arguing in the federal court, should you rule in Ms. Robichaud's favor, that for a number of reasons the order is not entitled to be treated as QDRO, that the plan is not obligated to accept it as a QDRO, and that in fact, [p. 53] under federal law, you've gone beyond your authority.

THE COURT: Um-hum.

MR. MILLS: But we aren't submitting that to you as –

THE COURT: Well, okay. Except my second question, I've got three questions, my second question is you have mentioned about retroactive to the date of the entry of the Judgment of Divorce, and I believe it's October of '8 –

MR. MILLS: Four.

THE COURT: – '84, and my question is, if one were going to do this retroactive, it would make more sense to do it retroactive to January 1, '95, or '85, rather, January 1, '85, when the law would take effect, to say that is if the parties had known and this would have been their decision, and not to go back to before the law was in effect, but when the law was effective.

What's the flaw in that analysis, or that approach?

MR. MILLS: I'd be arguing a combination, I think, of federal and state law if I were to get into that.

THE COURT: Go ahead.

MR. MILLS: Our position is that the death of a plan participant freezes the rights that plan parti- [p. 54] cipant has under ERISA, and –

THE COURT: Now, that would clearly be your argument. That's a –

MR. MILLS: That's in federal court. So –

THE COURT: – yeah, and that's your most, your strongest argument, it seems to me, up there.

MR. MILLS: –so, I mean, if you were to say, what is my state law argument –

THE COURT: Right.

MR. MILLS: – I guess it would be that you have not been presented with clear and convincing evidence that these parties would have done that –

THE COURT: Yeah.

MR. MILLS: – on January 1, '85 –

THE COURT: Right.

MR. MILLS: – or on February 2, '86, or –

THE COURT: Or any other day before he died.

MR. MILLS: – on the day before he died.

THE COURT: That's right.

MR. MILLS: You have no clear and convincing evidence that could support such a ruling.

THE COURT: Good. Okay. That I understand and I think that's very responsive to my question.

The last question is perhaps, and I'm not sure, until I heard your closing argument, I wasn't [p. 55] able to frame it, and now I just hope I can say it in an articulate fashion.

All of these procedural defenses that you have noted, Rule 4:50, mistake, one year to bring that, her delay in Mercer County and Somerset County, which of course your client was a party or an intervenor the whole time and had the same opportunities, but we'll disregard that for a minute, the nunc pro tunc relief because we're not going to change the status of parties, all of that is aimed to protect parties.

You're an intervenor, and I wonder aloud for purposes of hearing from you what standing AT&T has to assert those legal defenses vis-a-vis the Estate of Winston Samaroo and Ms. Robichaud, I mean, you're here because it was, you were granted leave to be here, but now that you're here and you've had your say, it seems to me a fair question that does need to be addressed, even by way of

authority if there is some, to show that you have the right to assert these defects, or these procedural problems, or substantive problems, however they're viewed, when in fact these are problems are procedures to protect Mr. Samaroo, not to protect AT&T.

Do you understand the gist of what I'm asking?

MR. MILLS: Well, I think I do, your Honor –

THE COURT: Good.

[p. 56] MR. MILLS: – but if you look at this case, first of all, you had raised this earlier, I think, in one of our –

THE COURT: Very perceptive of me, I didn't realize I was smart enough to it at that stage. Okay.

MR. MILLS: – you raised this two sessions, at the case management conference –

THE COURT: Good.

MR. MILLS: – when you indicated you weren't even sure you'd let the AT&T Management Pension Plan ask such questions of Ms. Robichaud as about delay, laches –

THE COURT: Good.

MR. MILLS: – and so forth.

THE COURT: Glad I raised it.

MR. MILLS: So you –

THE COURT: It's still with me; it's still with me.

MR. MILLS: All right. And it's not one which I haven't given some thought to. On the other hand, when we moved Judge Carchman for intervenor status, we discussed with him, and our papers indicated the fact that you can't just look at this case for, really, for point one in our brief, that this isn't really a case or controversy as between a plaintiff and a defendant.

[p. 57] There is no –

THE COURT: Well, it is now.

MR. MILLS: Well, your Honor, I –

THE COURT: I made it that by putting the estate in.

MR. MILLS: – Well, I understand, but I would raise the issue, do we know as we sit here today whether the estate has been reopened?

THE COURT: That's my question of her when I come – after her argument. But go ahead.

MR. MILLS: Because if that hasn't been done, then –

THE COURT: I may not be able to give the decision.

MR. MILLS: I would suggest that.

THE COURT: Right. I would agree with that.

MR. MILLS: However, our position at the time we requested intervenor status was that you can't look at this action simply as a request by Ms. Robichaud to get a piece of paper which she's now submitted and hang it on

her wall. This is not a request to change a divorce decree merely for the purpose of changing the decree. It's a request to change the divorce decree and affect the rights of the AT&T Management Pension Plan.

Given that that's the case, and we were gran[p. 58]ted intervenor status, I'm not sure how you parse out the issues on which we can speak or bring for the Court.

THE COURT: With all due respect, I'm going to interrupt you.

MR. MILLS: Sure.

THE COURT: Because I want to bring focus to the question. I'm not questioning – I'm questioning whether you have standing to object because these rules weren't intended to protect you in the problem you're dealing with in the federal court. They were intended to protect Winston Samaroo and now the Estate of Winston Samaroo. So you're here, you've raised them, I'm considering them, but I still wonder aloud what right you have to assert them.

Are you saying you've answered the question already? Is that what you want to tell me?

MR. MILLS: Well, I don't want to repeat, I –

THE COURT: And that's okay.

MR. MILLS: – I think I'm going to come back to it –

THE COURT: Okay.

MR. MILLS: –which is once we're granted intervenor status, and I'm not sure that you limit an intervenor to what my specific arguments, or only to [p. 59] raising arguments that can clearly benefit its side.

If your Honor wishes simply to consider that we're serving a deus ex machina role and we are –

THE COURT: You'll have to tell me what that means.

MR. MILLS: The stage name, the character that appears from the sky –

THE COURT: Okay.

MR. MILLS: – in a play.

THE COURT: Oh, okay. Yeah, okay.

MR. MILLS: The character appears from the sky in a play –

THE COURT: Sure.

MR. MILLS: – and suddenly makes some, in this case, raises four legal points –

THE COURT: Um-hum.

MR. MILLS: – which are simply for your consideration. And you wish to say, well, those really aren't points benefitting the Management Pension Plan. That may be so. They are still legal points which in the absence of our having raised them would not necessarily be raised for the reason, which we pointed out in Point 1, my first point in the final argument, this is not a justiciable case or controversy, irrespective of whether the estate has

been opened or not, because [p. 60] there is no real adverse party in interest.

But I understand your issue. I don't think I have –

THE COURT: Are there any cases that you could find on this subject?

MR. MILLS: Well, to be honest with you, I have not researched that, and if you'd like –

THE COURT: No.

MR. MILLS: – some submission, I could, but –

THE COURT: No, I've got to move ahead. If the estate portion is ready. I'm going to have to move ahead on this.

MR. MILLS: I understand.

THE COURT: I mean, this is a case where if that agreement is indeed signed, it's virtually a consent decree between the estate and Ms. Robichaud. It's not exactly that, but it's virtually that. And the question is whether or not in state court proceeding to modify the Judgment of Divorce, AT&T can stop that from happening. That's the lingering question. It's not a direct question, but it's a lingering question that I have that bears directly on the case.

MR. MILLS: I guess I'd prefer that it not necessarily be viewed that the Management Pension Plan [p. 61] itself has stopped it from happening, but has brought legal arguments to your Honor's attention which would raise in your mind a legitimate question as to whether it should happen, even though there has been the equivalent of a collusive consent decree.

THE COURT: I enjoy having colloquy with you as well as with Ms. Robichaud, and I have to say the next question is, what is the role of the judge where there is essentially a consent matter? And that's a fair question. I mean, do we simply sign it blank, or do we have a role? And I think most judges would agree that we do have a role, and because if it could be accomplished simply by their agreement, they would have done so, the law would permit them to do so. But whenever it takes the blessing of the Court, then – so that's the next issue that jumps to my mind as I listen to what you have to say.

MR. MILLS: I would again, I would jump in on that side and say the Court is not to be just a rubber stamp for something that may be legally inappropriate, legally impermissible, equitably inadvisable.

THE COURT: Um-hum. Last question, and it's a fourth question. Judge Fuentes' trial court decision. I looked at this last yesterday, and I think I can find it here, REAGAN, REAGAN v REAGAN. Have you read that [p. 62] recently?

MR. MILLS: I probably haven't read it recently.

THE COURT: Okay. All right.

MR. MILLS: REAGAN v REAGAN, is that a New Jersey –

THE COURT: Yeah, it is.

MR. MILLS: – that's a New Jersey case?

THE COURT: It is. It was a decedent, and it was not the same situation. There's nothing, there's no controlling case in New Jersey. Absolutely. I couldn't find

them. Neither, it appeared to me, could any of you find really controlling cases. LARKIN is distinguishable, as you suggest, but, well, if you haven't read it recently, I want to just give you a change to respond to it because there was a fundamental question that I had, and that is, there's something offensive about saying when somebody dies, you're going to change the Judgment of Divorce.

I mean, there's something that I had to deal with at an intellectual level, and it did seem to me that Judge Fuentes had a similar, very similar issue, and resolved it that, yes, indeed, there are good reasons. And I wanted to give you a chance to respond if you disagree with that analysis.

[p. 63] MR. MILLS: I guess without having specific recall. I'd certainly be glad if you could hand me a copy of it. While plaintiff is arguing, I'll scan it, if it's scannable.

THE COURT: Okay. Well, I –

MR. MILLS: But my first response is to hark to the cases that I think are extremely close on point from other jurisdictions.

THE COURT: Right. I know that you would do that.

MR. MILLS: Where each of those courts, appellate courts and trial courts, had the same queasiness you did to a point –

THE COURT: And resolved it, said no.

MR. MILLS: – and they said no.

THE COURT: That's no.

MR. MILLS: To the point where they said no.

THE COURT: That's right.

MR. MILLS: In this circumstance.

THE COURT: Right. I understand. But as a case of first impression in New Jersey, I looked at New Jersey also for help in dealing with this.

It's 246 N.J. Super, Sergeant, if you could get it.

SERGEANT-AT-ARMS: Yes, Judge. 246?

Summation – Ms. Robichaud

[p. 64] THE COURT: And I want you to be able to listen to our argument, so we'll give you a couple of minutes afterward.

Thank you very much, Mr. Mills.

MR. MILLS: Yes, your Honor.

THE COURT: Okay. I'll give you the book afterward because I want you to listen to her argument.

Ms. Robichaud, I'd be happy to hear your closing argument.

MS. ROBICHAUD: Yes. Thank you, your Honor.

I know that your Honor has read the trial briefs that were submitted and supplemental trial briefs, and I certainly incorporated them by reference in my opening statement, and I would like to incorporate by reference in my summation.

First of all, I believe, your Honor, that the jurisdiction is within the family law, Family Part, a court of equity of the State of New Jersey, to address this issue as to my application to modify the property settlement agreement. There is no other place for me to go to modify this property settlement agreement because it was incorporated in a Final Judgment of Divorce in the State of New Jersey.

I believe that there are basically three areas, three prongs, to your Honor's ability to grant

* * *

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - FAMILY PART
SOMERSET COUNTY
DOCKET NO. FM-18-454-96

LOUISE ROBICHAUD, Plaintiff, v. WINSTON SAMAROO, Defendant.	TRANSCRIPT OF STATEMENT OF REASONS

Place: Somerset County Courthouse
Bridge and Main Streets
Somerville, NJ 08876

Date: June 28, 1996

BEFORE:

HONORABLE THOMAS H. DILTS, J.S.C.

TRANSCRIPT ORDERED BY:

LOUISE M. ROBICHAUD, ESQ.

APPEARANCES:

NONE

Transcriber Barbara A. Cardenuto
10 Prospect Hill, Apt. 1-A
Flemington, NJ 08822-1333
(908) 782-1526

Sound Recording
Operator: T.H. Dilts, J.S.C.

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[p. 2] INDEX

STATEMENT OF
REASONS:

The Court Page 3

[p. 3] THE COURT: Okay. I'm now in court on Monday morning, and I'm giving my statement of reasons in the matter of Louise Robichaud, R-o-b-i-c-h-a-u-d, versus Winston Samaroo, Docket No. FM-18-454-96.

I need to say before I go into the details of this decision some important observations and procedural matters.

First of all, this matter was tried on Tuesday, June 25th and completed on Wednesday, June 26th. On Friday, June 28th, I entered the amendment to the Judgment of Divorce and the Property Settlement Agreement that had been submitted by the plaintiff Louise Robichaud. This constitutes my statements of reasons, including findings of fact and conclusions of law.

Next I need to put on the record that on Friday, June 28th, I did receive the signed agreement that was from the Estate of Winston Samaroo that was referenced in Mr. Martindale's letter of June 19th to me. That letter and the position of the Estate was discussed at length in the telephone conference call which was held on the record on or about June 19th.

A transcript of that case management conference should be obtained if there is any question raised with respect to the position of the Estate and the authority of Mr. Martindale to represent the Estate [p. 4] and the position of the Estate pursuant to his appearance that was

filed in this matter on behalf of the Estate of Winston Samaroo on May 23rd, 1996.

Suffice it to say that it was the position of the Estate that they did not oppose the relief that was being sought by Ms. Robichaud; that there was an agreement with respect to any relief that would be obtained by Ms. Robichaud; that agreement was signed, and Mr. Martindale requested permission not to appear at trial because he had nothing to offer in opposition to the relief that she was receiving, and that he chose not to appear for that reason.

To conclude the position with respect to the Estate, I received the document which included the Certificate of Appointment by the State of New Hampshire, Probate Court for Hillsborough County, of Roxanne, R-o-x-a-n-n-e, F. Benson as the Executrix, and the estate was reopened to allow her to sign the agreement.

So I have received the necessary documents to say with – to conclude that the Estate does not oppose Ms. Robichaud's relief in this matter.

The third matter that I wish to address is that although neither counsel brought to my attention the federal opinion in SAMAROO v SAMAROO, I – and if it was referenced in any of the briefs I did miss [p. 5] it, and I apologize for any inference that I'm creating to the effect that I did not, but I, my law clerk brought it to my attention, and I'm quite sure that it wasn't from the papers.

It is an interesting and important opinion, and it's published at 743 Fed. Supp. 309. It was a 1990 opinion by

Judge Brown of the federal District Court. This provides the context for me to understand the overall litigation. Although both parties, I'm sorry, both counsel did thorough and accurately report to me the status of litigation, I found Judge Brown's opinion to be important because it confirmed what they had said and gave me the context in which to better understand this small part of this overall important litigation.

Simply stated, this is a dispute between Louise Robichaud and the estate of her former husband, Mr. Winston Samaroo, over the terms of her divorce decree entered in October 1994 (sic). That has been received in evidence as P-11. The Property Settlement Agreement provides at Paragraph 3.2(d) as follows:

"Pension, profit-sharing and Bell Systems Savings Plan – 1. Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of the husband's retirement and receipt of his pension, he agrees [p. 6] to pay to wife one-half of said monthly amount." That ends my reading of the applicable portions of the agreement.

The judgment of Divorce entered – That's P-1. The Judgment of Divorce entered on October 25th, 1984, incorporates by reference the Property Settlement Agreement, P-11. The issue is whether the Property Settlement Agreement, the language which I read, and the Judgment of Divorce ought to be modified to provide that Ms. Robichaud would have the right to share in one-half of his pension; that is, Mr. Samaroo's pension, if he died before her. That's the essential question that's posed and which I need to decide.

The procedural background of this case is tortured. It was placed on the record during the March, I believe it was March 18, 1996, case management conference which I conducted. I incorporate that transcript for that case management conference by reference.

Suffice it to say here that the United States District Court remanded the issue that I have just set forth above to the state court for resolution. And that was done by Judge Brown in July 1990, six years ago. The matter was venued at that time in Mercer County, and continued in Mercer County for almost four years.

In March of 1994 the matter was transferred to [p. 7] Somerset County because, presumably because Ms. Robichaud is a matrimonial attorney who practices on a regular basis in Mercer County. The file, however, was not transferred by Mercer County to Somerset County until mid- to late 19 – well, sometime after, let me say it that way, sometime after July 1, 1995. And given the document number, it would appear to me to be late in the year 1995.

The first case management conference was held by Judge Ross in December 1995, the second case management conference was conducted by me on March 18th, 1996. At that time, among other things, I determined that it was necessary to add the Estate of Winston Samaroo as a party to this action. That was accomplished by Mr. Martindale's appearance on May 23rd, and the acknowledgment of the amended complaint, which was filed on April 8th, 1996, pursuant to my order. The matter was scheduled for a plenary hearing on June 25th, and I

concluded that hearing on June 26th. As I said earlier, the order was entered on June 28th.

Now, I'm going to first focus on the defenses that have been raised by AT&T Management Pension Plan as intervenor in this matter. The first is that there is no justiciable controversy present here. I find that I disagree with that conclusion; in fact, there is.

[p. 8] The federal court stayed its proceedings on Ms. Robichaud's pension claim against AT&T Management Pension Plan to allow the state court to determine what rights, if any, she would be given in this matrimonial matter. They clearly understood that this was a state court proceeding and needed to be resolved by the state court, and, really, that they were not in a position to decide the federal issue until they knew how the state court resolved the question of whether or not the Property Settlement Agreement and the Judgment of Divorce would be modified.

The second point that is made is that, by AT&T Management Pension Plan, is that, by way of defense, is that a court, this Court may not enter an Amended Judgment of Divorce retroactively nunc pro tunc, n-u-n-c, pro, p-r-o, tunc, t-u-n-c.

I disagree, Nunc Pro tunc means "now for then." I conclude that a court of equity can enter such a judgment when it's in the interest of justice to do so. I conclude that I have the authority to do so. Of course, that does not decide the issue of what weight Judge Brown or his successor judge in the United States District Court will give to my determination. Clearly, by adding those words and seeking to at this time give effect to my decision now

retroactive to January 1, 1985 [p. 9] when the Retirement Equity Act took effect will be for Judge Brown to determine. I determine as a state court judge that I have the authority to do so.

AT&T Management Pension Plan correctly argues that judgments nunc pro tunc are generally done, entered when an omission in the record was done through inadvertence or mistake. That is the time when we generally enter such orders, to say that it would be given retroactive effect with the same effect as if it had been regularly done.

But I also find that there are other times when we have the authority to retroactively modify Judgments of Divorce, and to do so as if it was effective on a given date retroactively. It is in this – this case is such a case where we are doing a thing now which we intend would have the same legal force and effect as if it had been done when it ought to have been done, in this case on January 1, 1985.

I do note before I go to the next legal defense raised by AT&T that Ms. Robichaud in her proposed amendment of the Judgment of Divorce did not request that it, that the words "nunc pro tunc" be officially included in the amended judgment, and those words do not appear. But I do wish to be clear that it is my intent to say that it is amended as if it had [p. 10] been entered on January 1, 1985.

The third defense that's raised by AT&T does have some bearing upon the authority of the Court to enter this Amended Judgment of Divorce and to amend the

Property Settlement Agreement. AT&T Management Pension Plan argues that fundamental principles of contract law preclude Ms. Robichaud from altering the terms of the separation agreement and implicitly prohibit this Court from changing that agreement.

I disagree with that conclusion. This is a court of equity with broad discretion to amend or modify Property Settlement Agreements when exceptional and compelling circumstances can be shown. See, for example, N.J.S. 2A:34-23; Rule 4:50-1(f); GUGLIELAMO v GUGLIELAMO, G-u-g-l-i-e-l-a-m-o, 253 N.J. Super 531 (App. Div. 1992); EDGERTON v EDGERTON, E-d-g-e-r-t-o-n, found at 203 N.J. Super 160 (App. Div. 1985).

The next objection is a series of technical objections which include but are not limited to the following: (a) That the parol evidence rule bars Ms. Robichaud from attempting to alter the agreement; (b) that the Court cannot reform on the basis of mutual mistake; (c) that the Court cannot make a better contract for Ms. Robichaud than she herself made when the Property Settlement Agreement was signed in 1983, and [p. 11] (d) that she is barred by Rule 4:50-2 and principles of equitable estoppel from bringing this action.

I reject all of these arguments in their entirety because AT&T does not have standing to raise these arguments. It is only the Estate of Winston Samaroo that has the right to raise these issues. The rules and policies argued by AT&T Management Pension Plan were adopted and enforced to protect Winston Samaroo, not AT&T.

The Estate does not disagree with the relief that's requested, and the attorney for Mr. Samaroo says that this would have been Mr. Samaroo's wish to so modify and amend the Judgment of Divorce and Property Settlement Agreement. That ends this Court's inquiry and detailed consideration of the issues raised – these issues raised, (a) through (d), is not necessary in view of the agreement with the Estate which I recited and the position of the Estate.

In essence, what AT&T is attempting to do is to enforce the 1983 agreement according to its terms as written in 1983. AT&T Management Pension Plan may not do that as a matter of law. It was not a party to that contract, and it was not a third-party beneficiary, it has no privity with Winston Samaroo or Louise Robichaud.

[p. 12] We have two important New Jersey cases which hold to this effect. A party cannot enforce provision of a contract to which he is not a privy unless it is clear that the parties to the contract intended to confer upon him the right to enforce it. BROOKLAWN v BROOKLAWN HOUSING CORP., 124 N.J.L. 73 (Errors and Appeals 1939), and FIRST NATIONAL STATE BANK OF NEW JERSEY v CARLYLE, C-a-r-l-y-l-e HOUSE, INCORPORATED, 102 N.J. Super 300 at 322 (Chan. Div. 1968).

I also submit that even the United States District Court implicitly recognized that this is an action between Ms. Robichaud and the Estate and not involving AT&T Management when it said in its written opinion at 743 Fed. Supp. 309 at page 315, the following: "The non-federal claim is purely a dispute between Robichaud and

the estate of her former husband over the terms of their divorce."

I see two very real and very interesting legal issues presented by this case. The first is whether this Court or any Court can and indeed should retroactively modify a written property settlement agreement after the death of a party to that agreement. My decision is that yes, this Court does have the authority to do so.

The second is whether the facts of this case [p. 13] are such as to constitute exceptional and compelling circumstances to justify the amendment of the Property Settlement Agreement and the Judgment of Divorce. My decision is that yes, the facts of this case are so exceptional and compelling as to justify this unusual result. I'll deal with these issues separately.

On the first issue, my first thought was one of discomfort, dis-ease – and I spell that as not dis-ease, but d-i-s-dash-e-a-s-e) and apprehension at the prospect of changing a property settlement agreement after the death of a party. This situation is not the situation the New Jersey Supreme Court dealt with in CARR v CARR, 120 N.J. 336 (1990), because in that case there was no agreement.

Because of the death of the party during the litigation, the Court was required to deal with the issue of the proper share to the surviving spouse. This is not a case where an agreement had been reached between the parties, and after the death of the parties the agreement was changed. That's the case I have here.

Much closer to the case at bar, but not directly on point, is Judge Fuentes' decision in REGAN, R-e-g-a-n, v REGAN, 246 N.J. Super 473 (Chan. Div. 1990). The Court was required to determine what the intent of the deceased husband and surviving spouse was [p. 14] at the time they entered into the Consent Judgment of Divorce.

Also, N.J.S. 2A:81-2, the Dead Man's Act, is a legislative enactment that in actions where a party is sued in a representative capacity, representing the interest of a decedent, and a claim is asserted against the Estate on the basis of a promise, statement or act of the decedent, then the proposition must be established by "clear and convincing proof." Certainly the Dead Man's Act implicitly recognizes that such actions are not barred, but rather are held to a higher standard of proof.

Finally, we know that even a decedent's Last Will and Testament can be modified by a court to carry out the true intention of the testator by application of the si paret doctrine. Certainly if a Last will and Testament can be so modified in extraordinary circumstances, it may also be appropriate to modify other legal documents, including matrimonial property settlement agreements in order to carry out the intent of the decedent.

I conclude that this Court does have the power to modify the written Property Settlement Agreement entered into by Ms. Robichaud and Mr. Samaroo on March 30th, 1983.

[p. 15] The next question is whether the facts of this case are such as to constitute exceptional and compelling circumstances to justify the amendment of the Property

Settlement Agreement and the Judgment of Divorce. Let me begin by saying that I do see my role as bringing to bear my independent judgment, based upon the record, as to whether or not this case presents such circumstances.

Although the Estate has not objected to the relief requested by Ms. Robichaud, that is not sufficient under the circumstances to justify entry of an Amended Judgment of Divorce. The act of entering an Amended Judgment of Divorce calls upon this court to make an independent judgment based upon evidence that such action is indeed appropriate. Although the parties can enter into an amended separation agreement, they cannot, without the involvement of the Court, actually have an Amended Judgment of Divorce entered.

I have been a Superior Court judge assigned to the Family Part for more than five years. The divorce of Ms. Robichaud and Mr. Samaroo, based upon the evidence before me, can certainly be viewed as one of the most amicable that I have seen. The situation itself is extraordinary and exceptional, as evidenced by some of the documents that have been received in evidence.

[p. 16] For example, P-3 is evidence that Mr. Samaroo, at expense to him, doubled the amount of life insurance which he had available from AT&T, and it would be for the benefit of Louise Robichaud at the time of his death. He made this election in November 1986, two years after the Judgment of Divorce was entered. He clearly was under no duty to do so, and yet he chose to do so, P-4 and P-5 show that both Ms. Robichaud and Mr. Samaroo paid one-half of those premiums.

Ms. Robichaud testified credibly as to acts of kindness and generosity by Mr. Samaroo to her and for her benefit after the Judgment of Divorce was entered. This includes the fact that just before his death he went on a mortgage for $75,000 to allow Ms. Robichaud to convert a structure they owned into a law office, P-7. He was cooperative in the purchase by Ms. Robichaud of the interest in the Marital residence, P-6. Ms. Robichaud and Mr. Samaroo's attorney during the divorce, Joel Spivak, Esquire, both gave convincing testimony of the mutual respect and caring relationship between Mr. Samaroo and Ms. Robichaud.

Turning to the agreement itself, it is clear that it demonstrates this unusual relationship. Paragraph 2.1 on custody even envisions that either party may be in the marital residence, and that the children [p. 17] would live freely with both parties. After the separation and divorce, the parties continued to own the business properties as partners, 3.1. With respect to the pension, that is dealt with at Section 3.2(d) and I have read that already.

What is clear from this is that there is no waiver of the parties of the wife's right of survivorship. The parties stipulated that Mr. Samaroo would not have been given the opportunity to make an election of survivor benefits until the time of his retirement, and he did not in fact retire before his death; therefore, he never had the opportunity to expressly agree or disagree, or even to make that decision.

I note parenthetically that I am aware of the fact that it is the position of AT&T that under the plan at the time, because – at the time of the divorce, that he could not

have elected to name Ms. Robichaud as a recipient of the survivor benefit. But this issue is for the federal court, not the state court to decide. That ends my parenthetical.

I am required to evaluate the common intention of the parties to this contract. I do this by considering the relationship – relations of the parties, the attendant circumstances, and the purposes they were trying to achieve.

[p. 18] Where a party's intention is doubtful or obscure, the most fair and reasonable construction imposing the least hardship on either of the parties should be adopted. REGAN v REGAN, supra, at 478.

It was testified to by Mr. Spivak and Ms. Robichaud that they simply did not consider this issue in drafting the agreement, and that if they had considered it and raised it, they both believe that Mr. Samaroo would have opted to give that benefit to Ms. Robichaud.

I find that Ms. Robichaud has proven by clear and convincing evidence that Winston Samaroo would have indeed included in the Property Settlement Agreement a provision to give to Ms. Robichaud her right of survivorship to 50 percent of the defendant's vested pension benefits. It is the combination of this amicable divorce, the post-divorce relations between the parties and the absence of this issue having been raised squarely for a decision by Mr. Samaroo that caused me to conclude, reach this conclusion.

Of course, it will be for the federal court to decide whether or not there were any benefits to be left to Ms.

Robichaud; however, to the extent that there were benefits as a matter of law and contract between Mr. Samaroo and AT&T Management Pension Plan. [p. 19] Mr. Samaroo would have given Ms. Robichaud that right of survivorship up to 50 percent of the pension

And that is the – those are the reasons that I have entered the Judgment as requested by Ms. Robichaud. That ends my findings of fact and conclusions of law.

. . .

CERTIFICATION

I, Barbara A. Cardenuto, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on June 28, 1996, Tape No. 6, Index No. from 0001 to 1854, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.

/s/ Barbara A. Cardenuto
BARBARA A. CARDENUTO

#254
AOC NUMBER

July 4, 1996
DATE

LOUISE M. ROBICHAUD
Attorney-at-Law
4585 Route 27
CN 166
Kingston, New Jersey 08528
(609) 924-9699
PLAINTIFF PRO SE

LOUISE ROBICHAUD SAMAROO, Plaintiff	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION FAMILY PART SOMERSET COUNTY DOCKET NO. FM-18-000454-96
vs.	:	
WINSTON R. SAMAROO, Defendant	:	
vs.	:	Civil Action
ESTATE OF WINSTON R. SAMAROO, Third Party Defendant	:	AMENDED JUDGMENT OF DIVORCE (Filed 96 Jul 11)

This matter being brought before the Court on a Motion filed by Plaintiff to amend the Final Judgment of Divorce dated October 25, 1984, which incorporated a Property Settlement Agreement entered on March 30, 1983; and ATT-MPP having been granted Intervenor status; and Intervenor having removed the matter to the United States District Court; and the United States District Court having granted Plaintiff's Motion on March 27, 1990 to remand this matter to the New Jersey State Court to determine her request to modify the Property Settlement Agreement to include survivor rights to the Pension that were awarded to her; and an Amended

Complaint having been filed and served upon all parties; and an agreement having been reached between Plaintiff and the Estate of Winston R. Samaroo; and Pre-Trial Briefs having been filed by Plaintiff and Intervenor, ATT-MPP; and the Court having heard testimony on June 25, 1996; and the Court having determined by clear and convincing evidence that Plaintiff's request should be granted; and for good cause shown;

IT IS on this 28th day of June, 1996, ordered as follows:

1. The Final Judgment of Divorce dated October 25, 1984, which incorporated the Property Settlement Agreement dated March 30, 1983, is hereby modified at Section 3.2, Paragraph (d), to provide for Plaintiff's rights of survivorship to 50% of Defendant's vested pension benefits, and to be properly recognized as beneficiary and alternate payee of those rights.

2. Plaintiff shall immediately prepare a Domestic Relations Order and submit same to the AT&T-MPP Plan Administrator for approval and qualification.

3. Any disputes regarding the enforcement of Plaintiff's rights under this Amended Judgment of Divorce shall be submitted to the United States District Court pursuant to the Order entered by the Honorable Garrett E. Brown, U.S.D.J., dated March 27, 1990.

/s/ Thomas H. Dilts
Thomas H. Dilts, J.S.C.

Certified to be a True Copy
John N. Condelli
By /s/ Phillis J. Illegible
[SEAL]

LOUISE M. ROBICHAUD
Attorney-at-Law
4585 Route 27
CN 166
Kingston, New Jersey 08528
(609) 924-9699
PLAINTIFF PRO SE

LOUISE ROBICHAUD SAMAROO, Plaintiff *Pro Se,* vs. WINSTON R. SAMAROO, Defendant vs. ESTATE OF WINSTON R. SAMAROO, Third Party Defendant	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION FAMILY PART SOMERSET COUNTY DOCKET NO. FM-18-000454-96 Civil Action DOMESTIC RELATIONS ORDER

WHEREAS, Plaintiff, LOUISE M. ROBICHAUD, and WINSTON R. SAMAROO, were divorced by this Court by Final Judgment of Divorce dated October 25, 1984, which incorporated a Property Settlement Agreement dated March 30, 1983, while Winston R. Samaroo was an employee of AT&T and a participant in the AT&T Management Pension Plan (ATT-MPP); and

WHEREAS, Winston R. Samaroo died on September 20, 1987 while a full-time employee at AT&T; and

WHEREAS, an Amended Judgment of Divorce was entered on June 28, 1996 modifying the Final Judgment of

Divorce dated October 25, 1984 to provide for the Plaintiff's rights of survivorship to 50% of Defendant's vested pension benefits, and to be properly recognized as the beneficiary and Alternate Payee of those rights; and

WHEREAS, it is the intention of this Order to be a Qualified Domestic Relations Order pursuant to Paragraph 1 of the Amended Judgment of Divorce which amended Section 3.2, Paragraph (d) of the March 30, 1983 Property Settlement Agreement incorporated in the October 25, 1984 Final Judgment of Divorce and is designed to be in accordance with the Retirement Equity Act of 1984, Section 414(p) of the Internal Revenue Code, and the laws of the State of New Jersey regarding the equitable distribution of marital property (as that term is defined therein) between spouses and former spouses in actions for dissolution of a marriage pursuant to *N.J.S.A.* 2A:34-23; and

WHEREAS, the Amended Judgment of Divorce dated June 28, 1996 provided for the Alternate Payee to receive a separate and distinct marital benefit in the Participant's AT&T-MPP (Management Pension Plan). Upon qualification of this Domestic Relations Order, a specific and distinct portion of these plans becomes the property of the Alternate Payee. This Domestic Relations Order is entered into pursuant to the Amended Judgment of Divorce dated June 28, 1996 which has not been modified or otherwise changed. There is no previous QDRO on file that provides conflicting benefits; and

WHEREAS, the Court has personal jurisdiction over both parties to this action and jurisdiction over the

subject matter of this Order in this marriage dissolution action; and

WHEREAS, the parties to this action and the Court intend that this Domestic Relations Order shall be submitted to the Plan administrator of AT&T-MPP, for qualification pursuant to Title 29 U.S.C.A. Section 1056(d), as amended, and as defined by Code Section 414(p)(1)(B). The result of such qualification by the above-referenced Plan Administrator is that this Domestic Relations Order will then become a Qualified Domestic Relations Order.

DATA ON PARTIES TO THIS ACTION

The information required concerning the Estate of Winston R. Samaroo is as follows:

Winston R. Samaroo, S.S. #157-40-2037, was a full-time employee from August 13, 1965 until his death on September 20, 1987.

The information required concerning the Alternate Payee, Louise M. Robichaud, is as follows:

Current Address:
203 Bertrand Drive
Princeton, New Jersey 08540

Social Security No.:
148-42-1504

Date of Birth:
November 1, 1941

Payments to the Alternate Payee are to begin as soon as administratively practicable subsequent to the qualification of this Domestic Relations Order.

Allocation of Benefits: This provision of the Domestic Relations Order covers benefits that are to be paid to the Alternate Payee as a result of when the Participant, Winston R. Samaroo, would have become eligible to receive his benefits.

Nothing contained in this Order shall be construed to require any Plan or Plan Administrator to:

(1) Provide any type or form of benefit or option not otherwise provided thereunder, except that payment to an Alternate Payee may be required to begin on or after the date on which the Participant attains the earliest retirement age under the Plan at which the Participant could elect to receive retirement benefits even if such election has not been made.

(2) Increase the benefits which would otherwise be provided thereunder (determined on the basis of actuarial value); or

(3) Provide payment of benefits to an Alternate Payee which are required to be paid to another Alternate Payee under another Order previously determined to be a QDRO as defined in the Internal Revenue Code, 26 U.S.C. § 414(p).

This Order may be modified or otherwise revised if the Plan Administrator should advise the parties in writing of his specific reason(s) for not qualifying this Order.

/s/ _____
Thomas H. Dilts, J.S.C.

Virginia PAYNE, Plaintiff,

v.

GM/UAW Pension Plan, GM/UAW Pension Plan Administrator, and James Edmonds, Defendants.

No. CIV.A. 95-CV-73554DT.

United States District Court, E.D. Michigan.

May 7, 1996.

Thomas R. McCombs, Esq., Flint.

David M. Davis, Esq., Birmingham.

James L. Edmonds, Esq., Grand Blanc.

OPINION AND ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FRIEDMAN, District J.

This matter is presently before the court on cross motions for summary judgment. On May 2, 1996, the court held a hearing and heard oral argument. For the reasons stated below, the court shall deny defendants' motion and grant plaintiff's motion.

Background

In this case, plaintiff seeks pension benefits as the beneficiary of a pension plan with General Motors Corporation, where her ex-husband worked prior to his death. The case arises under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, et seq.

Plaintiff Virginia Payne was married to her husband, Donald Payne, for 27 years. On February 17, 1993, they obtained a judgment of divorce from Genesee County Circuit Court (Judge Robert Ransom) in the State of Michigan. One of the terms of the divorce judgment states:

> PENSION
>
> IT IS FURTHER ORDERED AND ADJUDGED that the Defendant, VIRGINIA L. PAYNE, shall be entitled to forty-five (45%) percent of Plaintiff's pension through General Motors Corporation. A Qualified Domestic Relations Order ("QDRO") shall enter under a separate Order within thirty (30) days of the date of this Judgment of Divorce.

At the time of their divorce, Donald was working for General Motors, and he was a participant in the General Motors Hourly Rate Employees Pension Plan ("the plan"), which is administered by GM. Donald died on March 20, 1993, just one month after entry of the divorce judgment.

The QDRO[1] called for in the divorce judgment provision quoted above was not signed by Judge Ransom until June 23, 1993, and it was not filed with the court until July 6, 1993, well after Donald Payne's death. However, Donald had signed this QDRO on February 12, 1993; and

---

[1] A Qualified Domestic Relations Order ("QDRO") is defined by ERISA as "a domestic relations order which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(i)(I).

Virginia signed it on June 9, 1993. The QDRO states in ¶ 3 that Virginia is "the alternate payee." Para. 5 states that Donald "assigns a portion of his benefits from the Plan." In accordance with the divorce judgment, ¶ 5(a) directs the plan to pay Virginia 45% of Donald's monthly retirement benefits. However, ¶ 5(d) states that "alternate payee shall not be designated as the sole surviving spouse for purposes of the Plan's pre-retirement survivor annuity benefit." And ¶ 10 states that "alternate payee shall not be designated as the sole surviving spouse for purposes of the Plan's qualified post-retirement joint and survivor annuity benefit."

Shortly after the QDRO was filed with the court, plaintiff submitted it to MetLife, which assisted GM in the administration of QDRO's, for payment of benefits. This claim was rejected in a letter dated August 2, 1993, on the following grounds:

> Although the QDRO does qualify, there are no benefits due to the Alternate Payee. Inasmuch as the Participant is now deceased, the pension benefit is no longer payable. Further, the QDRO is very clear in stating that the Alternate Payee is NOT to be designated a surviving spouse. As a result, there are no benefits owed to the Alternate Payee.

At this point Virginia obtained new counsel, Thomas McCombs, who represents her to this day. McCombs returned to Genesee County Circuit Court and filed a "Petition to Amend Qualified Domestic Relations Order." In this petition, Virginia asserted that the QDRO should be amended, nunc pro tunc, to grant her "full survivorship benefits as Alternate Payee" in order to "provide the

fullfillment of the intentions of the parties." Specifically, Virginia wanted ¶¶ 5(b) and 10 amended to delete the word "not," so that as amended the QDRO would provide that she " . . . shall be designated the sole surviving spouse." On April 4, 1994, Judge Ransom granted this petition and entered a "nunc pro tunc order amending qualified domestic relation order" and an "amended qualified domestic relations order" which provided Virginia with the amendments she sought.

The amended QDRO was presented to the GM Pension Administration Center for payment of benefits. In a letter dated August 22, 1994, the claim was denied on the following grounds:

> . . . this DRO is not a qualified DRO. The Pension Plan contains no provision allowing a surviving spouse to be established subsequent to the death of the Participant. To maintain actuarial soundness, no such post-death election is allowed. Prior to the Participant's death, neither the Judgment of Divorce nor prior QDRO established an intent to award the Alternate Payee any surviving spouse benefits. Thus, this DRO would contravene ERISA section 206(d)(3), which provides that a DRO is qualified only if it "(1) does not require a plan to provide any type or form of benefit or any option not otherwise provided under the plan, (2) does not require the plan to provide increased benefits (determined on the basis of actuarial value) . . .
>
> As a result, the Alternate Payee's interest in this case terminated upon the death of the Participant. . . .

Plaintiff commenced this action in Genesee County Circuit Court in August 1995. Defendants removed the case based on the ERISA claim. The complaint asserts two claims. Count I is directed at the plan administrator and seeks survivorship benefits based on the amended QDRO. Count II is a legal malpractice claim directed at plaintiff's prior counsel, James Edmonds, who represented her during the divorce proceedings. This claim alleges that Edmonds committed malpractice by failing to timely file the QDRO, and that this caused plaintiff to lose the survivorship benefits.

The Cross-Motions for Summary Judgment

The case is before the court now on cross motions for summary judgment. Defendant Edmonds is not directly involved in these motions. GM's position is that the amended QDRO should be disregarded because (1) it is inconsistent with the judgment of divorce, and (2) it violates ERISA by attempting to provide a survivor benefit that is not available under the plan. Plaintiff takes the opposite position, arguing that (1) the amended QDRO is controlling because it is consistent with the divorce judgment and reflective of the parties' intent, and (2) ERISA is not violated, because the QDRO was amended nunc pro tunc to the date of the divorce judgment, which was entered prior to Donald's death.

Under Fed.R.Civ.P. 56(c), summary judgment is appropriate if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with

> the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a properly supported summary judgment motion has been filed, the burden shifts to the party opposing the motion to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine dispute as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). Viewing the evidence "in the light most favorable to the opposing party," *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), summary judgment should be granted only if the evidence is so one-sided that a reasonable fact-finder could not find for the opposing party. *See Anderson*, 477 U.S. at 248-50; *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478-80 (6th Cir.1989). In other words, "[a] material issue of fact exists where a reasonable jury, viewing the evidence in the light most favorable to the non-moving party, could return a verdict for that party." *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 534 (6th Cir.1990).

GM devotes the first third of its brief to a discussion of the parties' intent regarding survivorship benefits. This discussion focuses on Virginia's deposition testimony, and on documents admitted as exhibits at her deposition. This evidence shows that Virginia and Donald negotiated the terms of their divorce over a 20-month

period (from June 1991 to February 1993). During this period, Virginia wanted the divorce judgment to include a provision entitling her to survivorship benefits under the plan; Donald was equally insistent that Virginia not be given this status.

This was the situation when the matter came before Judge Ransom on February 11, 1993. Apparently Donald made a concession at the hearing regarding Virginia's entitlement to a portion (45%) of his GM retirement benefits, and this is the provision, quoted above, that found its way into the divorce judgment. Judge Ransom indicated that the divorce would be granted, and the next day Donald's attorney forwarded a final draft of the judgment, and a proposed QDRO, to Virginia's attorney. Both of these documents were signed by Donald and his lawyer on February 12. Virginia and her lawyer, Edmonds, signed the divorce judgment on February 16, and Judge Ransom signed it on February 17. The QDRO was signed by Virginia and Edmonds on June 9, and Judge Ransom signed it on June 23. Donald remarried on February 18, the same day the divorce judgment was filed. He died one month later.

Virginia signed the divorce judgment on February 16, 1993. At her deposition, she testified that she reviewed the proposed QDRO at the same time, but refused to sign it because "I did not want to sign it if it was not going to give me the pension benefits I was expecting, and I wanted him [Edmonds] to be sure that it would."

As noted above, Donald died on March 20, 1993. Virginia submitted the proposed QDRO to MetLife for their opinion as to whether it would provide her with

survivor's benefits, and MetLife indicated that it would not. Virginia also did her own legal research, and concluded that "this QDRO was a little flawed" because the word "not" – in ¶¶ 5(d) and 10, that she "shall not be designated as the sole surviving spouse" – "would ruin the whole thing." With this knowledge, Virginia nonetheless did finally sign the QDRO on June 9, 1993, and it was signed by Judge Ransom on June 23.

In its brief, GM notes the general rule that ERISA benefits cannot be assigned or alienated. 29 U.S.C. § 1056(d)(1) states: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Congress passed an exception to this "anti-alienation provision" in 1984 in the form of the Retirement Equity Act. That act allows for a limited exception, namely, when a domestic relations order provides for ERISA benefits to be shared with or assigned to a spouse. To qualify for this exception, a domestic relations order must meet certain statutory requirements and, additionally, it may not:

> (i) require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
>
> (ii) require the plan to provide increased benefits (determined on the basis of actuarial value), [or]
>
> (iii) require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1056(d)(3)(D).

GM argues that the amended QDRO fails because it violates the first of these prohibitions. GM asserts that the survivor benefits are "not otherwise provided under the plan" because this benefit "was not preserved under the Judgment of Divorce." GM's Brief, p. 14 n. 8.[2]

GM's argument is circular and begs, rather than answers, the question. The issue is whether the amended QDRO is valid. The answer to this question, under the prohibition of 29 U.S.C. § 1056(d)(3)(D)(i), depends on whether the amended QDRO "require[s] a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan." GM is arguing, if [sic] effect, that the amended QDRO would require the plan to provide benefits which are "not otherwise provided" because the QDRO is invalid (because it does not reflect the divorce judgment), and the plan only provides benefits under a valid QDRO. The problem with this argument is two-fold. First, GM does not point to a single provision of the plan to support its argument that the amended QDRO seeks benefits "not otherwise provided." For example, GM has not pointed to any plan provision

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[2] GM denied Virginia's claim on the grounds that "the Pension Plan contains no provision allowing a surviving spouse to be established subsequent to the death of the Participant." Defendants' Exhibit J, p. 1. GM does not develop this argument in its brief, although it did raise the point again at oral argument. However, GM has not produced any plan provision to support the argument. In any event, the argument fails because Judge Ransom amended the QDRO nun pro tunc to the date of the divorce judgment (February 18, 1993), which preceded Donald's death.

stating that a survivor designation must be filed with the plan administrator prior to the participant's death.

Second, GM does not cite any authority to support the proposition that a QDRO is invalid if it is inconsistent with the divorce judgment, or if it is amended after the participant's death. The two cases GM does cite, *Dickerson v. Dickerson*, 803 F.Supp. 127 (E.D.Tenn.1992), and *In re Norfleet*, 243 Ill.App.3d 925, 184 Ill.Dec. 63, 612 N.E.2d 939 (1993), are inapposite because the facts are completely different from those in the present case.[3]

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[3] In *Dickerson*, the plaintiff wife sought to enforce a provision in her divorce judgment stating that she was entitled to a percentage of her ex-husband's pension benefits. She sought an immediate lump sum payout. The court denied the requested relief because the husband was not yet eligible for benefits under the plan as he was not yet 55 years old. Since he was not yet eligible, a lump sum payout to the wife would have been benefits "not otherwise provided." In the present case, GM has not shown that Virginia is attempting to obtain benefits at a time or in an amount that the plan would not otherwise provide. In *Norfleet*, the divorce judgment required the husband to pay $50,000 to his wife from his pension plan. He died before paying the full amount. The ex-wife sued the pension plan to obtain the balance. The court held that this could not be done. One of the reasons was that no QDRO was in place at the time of the husband's death, and the court did not believe she could obtain a QDRO after his death. However, the main reason for the decision was that the husband had designated his son as the sole beneficiary to the 401(k) account, and the court believed the son's interest vested irrevocably upon death. In the present case, there is no such conflict between the ex-wife and some other person claiming an interest. Donald's second wife is not eligible for any survivor benefits, and apparently is not claiming any, because she was married to Donald for less than one year.

For these reasons, the court concludes that GM has failed to show that the amended QDRO is invalid under the "not otherwise provided" prohibition of 29 U.S.C. § 1056(d)(3)(D)(i).

GM next argues that the amended QDRO is invalid because it is inconsistent with the divorce judgment. GM takes the position that (1) the divorce judgment did not provide Virginia with any survivorship rights, and (2) the amended QDRO is invalid because it purports to provide such rights, making it inconsistent with the divorce judgment.

GM does not prove the first half of its argument merely by referring to the divorce judgment itself, as the judgment is silent as to survivorship rights. The only provision in the divorce judgment regarding Virginia's rights to pension benefits is the one quoted above, which simply states that she "shall be entitled to forty-five (45%) percent of Plaintiff's pension through General Motors Corporation."

GM argues that this case is similar to *Wilterdink v. General Motors Corp.*, No. 94-CV-708 (W.D.Mich. Sept. 19, 1995), an unpublished opinion by Judge Benjamin F. Gibson. In that case, a 1976 divorce judgment awarded a portion of the husband's pension benefits to the wife, whether paid in a lump sum or in monthly installments. The husband died in 1988 before retiring. In 1994, the wife sued GM for her portion of the benefits. GM denied the claim because the divorce judgment awarded her a portion of benefits paid to the husband, and he never received any.

While the case was pending, the wife returned to the divorce court and obtained an order designating her as the surviving spouse on her husband's pension. Judge Gibson held that this order failed to accomplish the desired result because the divorce judgment "controls distribution of pension benefits" and the order did not amend the judgment. Slip op. at 6. Judge Gibson dismissed the case without prejudice to allow the wife to return to the divorce court to seek an amendment to the divorce judgment.

Wilterdink does not assist in the analysis of the present case. The divorce judgment in *Wilterdink* specifically gave the wife only a portion of benefits actually paid to the husband. Thus, the court was justified in concluding that the judgment did not provide for survivorship rights, and that therefore the judgment would have to be amended to provide for such rights. In the present case, the judgment awards the wife "45% of [the husband's] pension," and it is not immediately clear whether this means 45% of the benefits he would eventually receive, or a 45% survivor's benefit, or both. Thus, unlike *Wilterdink*, it cannot be said that the amended QDRO is inconsistent with the divorce judgment; one can only say that the amended QDRO provides for survivorship rights whereas the judgment is silent on that issue. If the rule from *Wilterdink* is that a QDRO cannot make an award which is inconsistent with the divorce judgment, that rule does not apply here because there is no such inconsistency.

GM's next case, *Dugan v. Clinton*, 1987 WL 11640 (N.D.Ill.1987), is equally inapposite. In *Dugan*, the ex-wife had a divorce judgment that awarded her "25% of the

monthly benefits 'if, as, and when the husband receives same.' " When the husband died, the ex-wife sued the plan for 25% of the survivor benefits. She asked the federal district court to amend the divorce judgment to read that she was entitled to 25% of "any benefits available." The court rejected this request on the grounds that (1) it had no power to modify a state court judgment, and (2) the requested amendment to the judgment would give the ex-wife benefits "not otherwise provided," since she could not be a "surviving spouse" (apparently because she was, at most, a surviving ex-spouse). Of course, this case bears no resemblance to the present case. Virginia is not asking this court to amend the state court judgment, but to enforce a QDRO already amended by a state court. Moreover, GM is not arguing that Virginia cannot be a "sole surviving spouse"; GM is simply arguing that she was not so designated in the divorce judgment.

Finally, GM cites *Kahn v. Kahn*, 801 F.Supp. 1237 (S.D.N.Y.1992), another case that bears no resemblance to the one at bar. In *Kahn*, the husband sought, but was denied, a divorce in New York. He later moved to New Jersey, where he obtained an ex parte, no-fault divorce. When his ex-wife learned that he was retiring, she informed his plan administrator that she was invoking a statutory provision of ERISA whereby a plan participant must elect to receive annuity payments under a "joint survivor" provision. The husband had told the administrator that he wanted the annuity paid under the "single life" option. The issue in the case was whether the husband could elect the single life option and thereby cut off his wife's survivorship rights. The answer to this question turned on whether plaintiff and defendant were still

married, since the New York court denied the divorce, but the New Jersey court subsequently granted a no-fault divorce ex parte. The federal court held that the New Jersey divorce was valid; and since only the legal spouse can require a plan participant to choose the "joint survivor" option, the husband was allowed to deprive his ex-wife of any survivorship rights.

GM's citation to *Kahn* is inapposite. The present case involves a divorce judgment and QDRO which might give the wife survivorship rights under the ERISA section dealing with qualified domestic relations orders. In *Kahn*, the ex-wife was attempting to enforce a statutory right to such benefits under a different section of ERISA. GM quotes the statement in *Kahn* that "plaintiff maintained no right under ERISA to compel the [joint survivor] option upon him." 801 F.Supp. at 1244. In our case, however, Virginia is not arguing that she has a statutory right to compel Donald to make this choice; instead, she is arguing that he voluntarily made such a choice as evidenced in the divorce judgment.

All of these cases (*Wilterdink*, *Dugan*, and *Kahn*) are cited by GM in an effort to show that "the 1993 judgment of divorce did not provide plaintiff Virginia Payne with Entitlement to Survivor Benefits under the GM pension plan." However, none of the cited cases support this argument on the facts in this case.

GM's final argument is that the amended QDRO is invalid because it is inconsistent with the divorce judgment. This is a rehash of the argument made previously in GM's brief and, again, the focus is on *Wilterdink*. For

the reasons explained above, *Wilterdink* is easily distinguishable from our case. GM also cites *Roth v. Roth*, 201 Mich.App. 563, 506 N.W.2d 900 (1993). In that case, the divorce judgment awarded the wife a portion of her husband's pension benefits as he received them. Years later, she asked the court to enter a QDRO stating that she would be entitled to survivor benefits. The court refused to do so on the grounds that the divorce judgment showed no intent of the parties to award such benefits. The Michigan Court of Appeals affirmed, stating that the requested QDRO could not be granted unless the divorce judgment were modified because "as written, the judgment precludes distribution of pension benefits to plaintiff until defendant begins to and only for so long as he does receive them. Defendant died before drawing any pension benefits." 201 Mich.App. at 569, 506 N.W.2d 900.

Like all of GM's other cases, reliance on *Roth* is misplaced. In *Roth*, the court indicated that the divorce judgment specifically provided only for a portion of benefits actually paid to the husband. The court also found that the judgment "precluded" payment of survivor benefits. In the present case, however, the divorce judgment does not provide Virginia with benefits only as Donald received them – the wording in the judgment is very general, saying that Virginia is entitled to 45% of Donald's pension. Unlike *Roth* and *Wilterdink*, it cannot be said that either QDRO (original or amended) is inconsistent with the divorce judgment. And certainly it cannot be said that the divorce judgment "precludes" survivorship benefits. Finally, *Roth* is distinguishable because in that case the ex-wife was asking the court to enter a

QDRO; in the present case, the state court has already done so, and plaintiff seeks enforcement of that order.

In her response and cross motion, plaintiff argues that the first QDRO contained contradictory language concerning her survivorship rights, and that the amended QDRO simply clarified those rights. Plaintiff also argues that the plan will receive a windfall if the amended QDRO is not enforced, since in this event the plan will not have to pay any survivor benefits to anyone, as Donald's second wife was not married to him long enough to qualify. Plaintiff further argues that the original QDRO gave her some survivorship rights, but failed to state specifically the extent of those rights.

Conclusion

Having reviewed the parties' briefs, studied the cited cases, and heard oral argument, the court is persuaded that summary judgment should be granted in this matter for plaintiff. Both of defendants' arguments fail. First, defendant has failed to demonstrate that the amended QDRO will require the payment of a benefit not otherwise provided under the plan. While GM asserts that a survivor may not be designated after a participant's death, GM has not produced a plan provision so stating. Moreover, the amended QDRO was entered nunc pro tunc to a date prior to Donald's death. Thus, the designation was not made after death.

Second, defendant has failed to show that the amended QDRO contradicts the divorce judgment. The divorce judgment awarded plaintiff 45% of Donald's pension and was silent as to survivorship rights; and the

amended QDRO specified that Virginia would receive 45% of the monthly benefits and [sic] as well as survivorship rights. GM's protestations to the contrary, there is simply no contradiction to be found between the two documents.

More importantly, to the extent there may be any inconsistency between the divorce judgment and the amended QDRO, Judge Ransom decided this issue in Virginia's favor when he granted her petition to amend the QDRO to make her the sole surviving spouse. A federal court must give full faith and credit to a state court judgment.[4] Whether Judge Ransom's ruling was correct or erroneous, this court is bound to respect it.

GM argues that the amended QDRO is a fraud on the Genesee County Circuit Court and turns the divorce judgment on its head. The answer to the complaint is that GM should have petitioned that court to vacate the amended QDRO. The amended QDRO is dated April 4, 1994. GM acknowledges that it was served with a copy "in April, 1994." GM's Motion, ¶ 9. GM could have sought relief from this order under Michigan Court Rule 2.612(C)(1)(c), which allows for a motion seeking relief from judgment within one year after entry for "fraud,

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[4] The statutory basis for this doctrine is the Full Faith and Credit Act, 28 U.S.C. § 1738, which states in part: . . . [J]udicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken. A considerable body of case law holds that federal courts ordinarily must honor final state court judgments. *See* generally 18 C. Wright & A. Miller, Federal Practice and Procedure § 4469 (1981).

misrepresentation, or other misconduct." And while GM was not a party to the divorce action, it had a right to intervene under Michigan Court Rule 2.209(A)(3). Instead, GM never took any action in state court and allowed Judge Ransom's order amending the QDRO nunc pro tunc to become a final, uncontested order of a state court of competent jurisdiction. GM has failed to offer any convincing reason why it should not be bound by that order.

For these reasons,

IT IS ORDERED that the motion of defendants GM/UAW Pension Plan and GM/UAW Pension Plan Administrator for summary judgment is denied.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is granted, and that defendants GM/UAW Pension Plan and GM/UAW Pension Plan Administrator pay plaintiff benefits in accordance with the amended QDRO.

IT IS FURTHER ORDERED that the complaint is dismissed without prejudice as to defendant Edmonds.[5]

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[5] The complaint indicates that the claim against defendant Edmonds is contingent upon a finding that "the denial of benefits as claimed by the Administrator was justified and legal." Complaint, ¶ 13. The court having made a contrary determination, the claim as to Edmonds is moot.

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

(2)

No. 99-1074

In The

Supreme Court of the United States

LOUISE ROBICHAUD SAMAROO,

Petitioner,

v.

AT&T MANAGEMENT PENSION PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CHRISTOPHER H. MILLS
Counsel of Record
CATHERINE J. SMITH
COLLIER, JACOB & MILLS, P.C.
580 Howard Avenue
Corporate Park III
Somerset, New Jersey 08873-1167
732.560.7100

Attorneys for Respondent AT&T Management Pension Plan

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3600

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the Third Circuit correctly apply ERISA, as modified by the Retirement Equity Act, in ruling that Petitioner's Amended Judgment of Divorce, issued by a New Jersey state court in 1996 as a purported amendment to a 1984 divorce judgment, was not a Qualified Domestic Relations Order, and was therefore preempted by ERISA, because it required the pension plan to "provide increased benefits" contrary to 29 U.S.C. §1056(d)(3)(D)(ii), by seeking to retroactively designate Petitioner a "surviving spouse" under her ex-husband's pension plan twelve years after his death, where Petitioner had not been so designated in the original Judgment and was not entitled to any payments from the pension plan as of the actual date of her ex-husband's death?

LIST OF PARTIES

The AT&T Management Pension Plan is an employee welfare and pension plan covered by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 *et seq.* AT&T Corp. is the Plan's sponsor.

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COUNTERSTATEMENT OF THE CASE AND FACTS

This case has a long history and a convoluted set of facts. It exemplifies the "shoemaker's children" parable, because Petitioner, a matrimonial attorney appearing *pro se*, sat on her rights during an almost three-year period when she could have secured the order that would have guaranteed her the relief she now belatedly seeks. Her situation is all but unique throughout the country. In the 15 years since the enactment of the relevant statute, there are only three other recorded instances of an analogous fact pattern: One occurred in a case that resulted in an unpublished district court opinion, and the other two in state court decisions consistent with the Third Circuit's ruling below. And, as explained *infra*, Petitioner's situation will most definitely be unique in the state of New Jersey, where this case arose, because that state's Appellate Division has ruled, after the state trial court's action in this case, that a New Jersey divorce judgment may not henceforth be retroactively modified after the death of one of the parties in such a manner as was done here. For these and other reasons, certiorari should be denied.

The dispute between the litigants here began 12 years ago, in 1988, when the AT&T Management Pension Plan ("MPP" or the "Plan"), an employee welfare and pension benefit plan governed by the Employee Retirement Income Security Act, 29 U.S.C. §1001 *et seq.* ("ERISA"), denied a claim by petitioner Louise M. Robichaud ("Petitioner" or "Robichaud") for Plan benefits. Robichaud had been married to Winston R. Samaroo ("Samaroo"), a participant in the MPP by virtue of his employment by various companies owned by AT&T Corp. ("AT&T"). Robichaud and Samaroo had separated in 1983 and

divorced in 1984. A Final Judgment of Divorce (generally, the "Judgment") dissolving the Samaroos' marriage was entered by a New Jersey state court on October 25, 1984. That Judgment incorporated the terms of an agreement relating to property and other assets that Robichaud and Samaroo had executed on March 30, 1983 (the "Property Settlement Agreement" or "PSA"). At both the PSA and Judgment stages, Samaroo had been represented by counsel. Robichaud, a licensed attorney with a matrimonial law practice, had not retained counsel, choosing instead to represent herself.

In addressing the division of Samaroo's pension entitlement with Petitioner, the Property Settlement Agreement did not require Samaroo to designate Petitioner as his surviving spouse or otherwise commit him to do anything other than pay his ex-wife half of what the parties believed his AT&T pension was worth at the time – an amount equal to $679.29 per month. Payments were to begin "at the time of [Samaroo's] retirement and receipt of his pension," and to continue for so long as he received it. Survivorship issues were addressed elsewhere in the PSA, where Samaroo obligated himself to continue to carry the supplemental life insurance offered to employees by AT&T and "irrevocably assigned" the policy to Robichaud. A section of the PSA entitled "Waiver of Property Rights" contained a mutual waiver and release of all claims by each party against the property of the other except as expressly set forth in the PSA.

In August 1984, two months before entry of the Judgment, Congress passed the Retirement Equity Act of 1984, Pub. L. No. 98-397 ("REA"), which became effective January 1, 1985. REA amended ERISA's provision that benefits

under pension plans "may not be assigned or alienated," 29 U.S.C. §1056(d)(1). In relevant part, the amendment specified a single narrow exception to the anti-alienation requirement: A spouse of a participant in an ERISA-governed pension plan who divorces that participant may become an "alternate payee" of the pension plan by obtaining a state court domestic relations order ("DRO") that meets certain enumerated requirements and thereby becomes a "Qualified Domestic Relations Order" ("QDRO"). 29 U.S.C. §1056(d)(3)(A). REA also amended ERISA to provide explicitly that if a DRO did not qualify as a QDRO, it was preempted and could not be enforced against a pension plan. 29 U.S.C. §1144(b)(7).

A QDRO "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a [pension] plan." 29 U.S.C. §1056(d)(3)(B)(i)(I). It can relate to child support, alimony payments or marital property rights, and orders a pension plan to pay directly to the non-participant spouse or former spouse a portion of the pension benefits for which the participant is eligible or will become eligible.

REA provides that a DRO cannot be considered a QDRO, and will be preempted and unenforceable, unless it meets seven criteria. The first four, which are administrative and set forth in §1056(d)(3)(C), require a state court DRO to specify:

> (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined,

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

The remaining criteria are contained in §1056(d)(3)(D) and set forth three substantive things that a DRO must *not* do if it is to escape preemption and be enforceable against a pension plan as a QDRO:

A domestic relations order meets the requirements of this subparagraph only if such order –

(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan;

(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

It is this section – and specifically subparagraph (ii) – which is the focus of this case.

REA did not specifically address whether its amendment of ERISA establishing the concept of a QDRO was to have retroactive effect as to state court DROs issued prior to its effective date of January 1, 1985, like Petitioner's October 25, 1984 Judgment. The Senate Report

regarding REA noted that the provisions of the new law "generally apply on January 1, 1985" and that if a pension plan had already been paying a non-participant under a DRO entered prior to January 1, 1985, it was to continue to do so. On the other hand, if it had not been paying a non-participant under a pre-1985 DRO, as was the case with Petitioner's Judgment, a pension plan was to have discretion to decline to treat such a DRO as a QDRO. S. Rep. No. 575 at 23 (1984).

Despite the fact that, as a practicing attorney in the field, Robichaud had to be familiar with the passage of REA in order to competently represent her clients, she took no action to amend her pre-REA Judgment to a QDRO during the 39 months her ex-husband survived after REA was enacted. During the proceedings below, Robichaud explained under oath why she had not acted to obtain a QDRO before her ex-husband died, confirming that what is involved here is a "mistake" in the dictionary but not in the legal sense of the word: "[N]o one anticipated that Samaroo would die prior to retirement age. . . . Neither Winston (nor his attorney) or I thought about the survivor rights to this pension. . . . [I simply] did not consider this issue in drafting the [Property Settlement] agreement." Thus, there was no "mutual mistake" as between Samaroo and Petitioner.[1] Petitioner just made the mistake of failing to protect her rights, which came back to haunt her on September 20, 1987,

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[1] *See Roth v. Roth*, 506 N.W.2d 900, 903 (Mich. Ct. App. 1993) (divorcing wife, who was not an attorney, "charged with the knowledge that the mortality tables showed [her ex-spouse] was likely to predecease her.")

when her ex-husband, who had not remarried, died while still actively employed by AT&T.

As a participant in the MPP, Samaroo could, while living, have qualified for one of two basic types of pension – a "Service Pension" or a "Deferred Vested Pension" – depending on the number of years of service with AT&T he had accumulated, and his age. Participants were eligible for a Service Pension if they had accumulated: (a) 30 or more years of service, irrespective of age; or (b) 25 or more years of service and had attained the age of 50; or (c) 20 or more years of service and had attained the age of 55; or (d) 10 or more years of service and had attained the age of 65. Participants were eligible for a Deferred Vested Pension if they had accumulated 10 or more years of service but were *not* eligible for a Service Pension.

Samaroo was 53 when he died and had 22 years, one month and seven days of service with AT&T. Thus, he was eligible *only* for a Deferred Vested Pension and *not* a Service Pension.

The key difference between a Service Pension and a Deferred Vested Pension was in terms of when a participant could begin collecting benefits. While both pensions provided benefits that would last for the participant's lifetime, those eligible for a Service Pension could retire and elect to receive payments immediately, although benefits would be actuarially reduced in an amount determined from actuarial tables, depending on the number of years before age 55 at which the participant retired. Those participants eligible for Deferred Vested Pensions could not begin to receive payments until their sixty-fifth birthday, unless the participant had accumulated 20 or

more years of service, in which case he/she could elect to begin receiving an actuarially reduced Deferred Vested Pension at age 55. Thus, if Samaroo had not died and had terminated his employment with AT&T the day before his death, he would have received no pension payments from the Plan until age 65 (because he had more than 20 years of service), unless he elected to receive actuarially reduced benefits at age 55 (which he could do because he had more than 20 years service); in this latter case, his benefit would have been reduced by approximately 60%. The bottom line is that at the time of Samaroo's death, because the Judgment only required him to pay Petitioner $679.29 per month when (and for so long as) he received pension payments from the MPP, Petitioner was left with a Judgment that granted her half of monthly pension payments that could never become payable under the terms of the Plan.

The MPP did provide a lifetime annuity to a *surviving spouse* of a participant who, like Samaroo, had qualified for a Deferred Vested Pension but died before retirement while still actively employed. This Automatic Survivor Annuity would commence immediately upon the participant's death if the participant, like Samaroo, had accumulated 15 or more years of service as of the date of death. But because this provision applied only if the participant left a "surviving spouse" at the time of his death, and Samaroo had long since been divorced from Petitioner without having remarried, this provision was not implicated upon his death, either in favor of Petitioner or anyone else.[2]

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[2] The only other type of annuity provided by the Plan to participants who were eligible solely for a Deferred Vested

Shortly after Samaroo died, AT&T and/or the MPP paid Robichaud and her daughters by Samaroo nearly $650,000 in benefits. These included payments of $54,000 each to two of Robichaud's daughters in accordance with the "death benefit" provisions of the MPP. Also, as the sole beneficiary of AT&T-sponsored basic and supplemental group life insurance on Samaroo, Robichaud herself was paid more than half-a-million dollars. In accordance with the terms of the Plan, the Plan Administrators determined that no Automatic Survivor Annuity was payable because Samaroo had left no "surviving spouse," and no QDRO designating Petitioner as such for purposes of receipt of the survivor's annuity had been served on the Plan prior to Samaroo's death. Indeed, the MPP never even received a copy of the October 25, 1984 Judgment until well after Samaroo's death.

Approximately eight months after Samaroo's death, on or about May 16, 1988, Robichaud began to assert in various correspondence to the Plan that she should be considered a beneficiary. Citing provisions of ERISA, as amended by REA, she claimed that she was entitled to receive payments from the MPP incident to Samaroo's status as a participant. She did not specify whether she

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Pension was a Deferred Vested Pension Joint and Survivor Annuity. But it applied to participants who had already retired on a Deferred Vested Pension, which Samaroo had not. And, in any event, the eligibility criteria for such an annuity provided: "The surviving annuitant may only be a spouse who is married to the participant on the date as of which the deferred vested pension commenced." Petitioner would thus have been ineligible for this benefit after Samaroo's death even if he had lived to retire.

sought survivor benefits and/or a monthly payment equal to the amount that Samaroo had agreed to pay her in the Property Settlement Agreement (which, of course, was not to be paid by Samaroo until he retired and started receiving his pension), or both.

In response to Robichaud's claims, the MPP again determined that no pension benefits were payable. It so notified Robichaud by letters dated June 23, 1988, October 27, 1988, December 12, 1988, and February 8, 1989. The Plan's position was based on several rationales. First, as of the date of his death, Samaroo had only a vested entitlement to receive a Deferred Vested Pension and not a right to immediate pension payments. Put another way, he might ultimately have become entitled to be paid a Deferred Vested Pension had he reached the requisite age but, at the time of his death, his pension had not yet become payable, even in actuarially reduced form. Because he was eligible only for a Deferred Vested Pension, payments to him could have commenced only when he reached age 65 or, at his election, when he reached age 55 (in an actuarially reduced amount). Second, when Samaroo died at age 53, no QDRO was in effect that directed the MPP to pay pension benefits to an "alternate payee." Third, Samaroo was unmarried at the time of his death and, because there was no QDRO designating Robichaud as a "surviving spouse," the Automatic Survivor Annuity provision was not applicable.

On April 13, 1989, Robichaud filed a motion in New Jersey Superior Court, under the caption of the original matrimonial action, aimed at securing the benefits she sought from the MPP. The motion sought to amend the October 24, 1984 Judgment so as to confer on her the

status that the Plan had denied to her, and to join the MPP as a respondent so that it could be ordered to pay her directly the amount specified in her Judgment.

Because this attempt to secure an order addressed to the MPP to pay benefits directly to Petitioner transformed the state action into a claim to recover benefits under 29 U.S.C. §1132(a)(1)(B), the MPP removed Robichaud's state court action to federal district court on May 16, 1989 and simultaneously filed in federal district court a separate Complaint for Declaratory Relief styled *AT&T Management Pension Plan v. Louise M. Robichaud*, which sought to have the question of Robichaud's entitlement to Plan benefits "clarified," also pursuant to 29 U.S.C. §1132(a)(1)(B). Robichaud moved to dismiss the Plan's declaratory judgment action and to remand the action which she had filed. Pursuant to an opinion dated July 17, 1990, reproduced at Petitioner's Appendix ["Pa"] 24-44, the district court retained jurisdiction over the Plan's declaratory judgment action and those aspects of Robichaud's action which implicated the purported ERISA-based obligation of the Plan to pay her benefits. It remanded the issue of Robichaud's proposed amendment to her Final Judgment of Divorce to the New Jersey Superior Court. It then stayed the federal proceedings pending the completion of the state court action.

After remand, the Plan sought and was granted Intervenor status in the state court action. For almost five and one-half years after the remand, the matter lay dormant in state court, without any documented efforts by Robichaud to expedite it to resolution. Eventually, after a change of venue, the state court action was "reactivated" in December 1995 in a different New Jersey county.

On June 25-26, 1996, a judge in the Family Part of the New Jersey Superior Court, Chancery Division, held a bench trial on that portion of Petitioner's action which had been remanded. No representative of Samaroo's estate, the nominal respondent in the caption of the case, formally appeared. In fact, to the extent the estate was represented at all during the entire proceeding, it was represented by an attorney procured and paid for by Robichaud, who had told the executrix of Samaroo's long-since-closed estate that "*we* would have to hire an attorney in New Jersey" and had asked the executrix, "Would you like me to find someone . . . ?" The executrix had agreed.

Despite the fact that the MPP had been granted Intervenor status, the state family court judge made it clear on the record during the trial that he did not believe the Plan had "standing" to raise any arguments under state and common law as to why the Judgment should not be retroactively amended.[3] In his Statement of Reasons supporting his ruling, the state court judge confirmed that he had not even considered MPP's arguments because he believed the Plan lacked "standing" to raise them; such

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[3] The MPP sought to argue that the "dispute" between Robichaud and Samaroo's estate, which supposedly provided the jurisdictional basis for the state court proceeding, was a sham, because there was never a dispute between Robichaud and the estate. The estate did not have and could not have any interest in survivor annuity pension benefits, inasmuch as there is never a circumstance in which a deceased participant's *estate* has a claim for such benefits, which are paid, if at all, to a surviving spouse. In sum, it was Samaroo's estate, if anyone, that lacked "standing" to litigate before the state court.

arguments, he held, could be raised, if at all, only by Samaroo's estate.

On June 28, 1996, the state court decided, as a matter of "equity," to amend Robichaud's October 25, 1984 Judgment. Petitioner and the opinion and dissent below refer to the Amended Judgment as a retroactive or *nunc pro tunc* order, but the Order actually entered by the state court – which had been drafted by Petitioner, who appeared *pro se* at the bench trial – nowhere uses the term *nunc pro tunc*, nor is it made effective on any date other than the one on which it was entered. Pa124-25. The state court judge, in announcing his reasons for entering the order, highlighted Petitioner's drafting omission by stating that it was his "intent to say" that Petitioner's Judgment was amended "as if it had been entered on January 1, 1985," but he did not modify the wording of the submitted order to conform it to his "intent." Pa115. Rather, the court merely dated the order June 28, 1996 and filed it on the court docket on July 11, 1996.

Nor did the proposed order submitted by Petitioner say anything about survivorship rights, with a view toward designating Petitioner as a "surviving spouse" for purposes of the MPP's Automatic Survivor Annuity. If anything, it muddied the waters by referring to Petitioner's "rights of survivorship to 50% of [Samaroo's] vested pension benefits and to be properly recognized as beneficiary and alternate payee of those rights."

The state court recognized that its order would not have binding effect on the MPP or the district court, which had retained jurisdiction to review any revised state court order to determine whether it was a QDRO

and whether Petitioner had a valid claim for benefits under 29 U.S.C. §1132(a)(1)(B) of ERISA. In announcing his decision, the state court judge stated, "Of course it will be for the federal court to decide whether or not there were any benefits to be left to Ms. Robichaud. . . . " Indeed, Petitioner herself recognized that the federal court was to decide the enforceability issue under ERISA, for she had drafted the order (which the state court entered) to read:

> Any disputes regarding the enforcement of Plaintiff's rights under the Amended Judgment of Divorce shall be submitted to the United States District Court pursuant to the Order entered by the Honorable Garrett E. Brown, U.S.D.J., dated March 27, 1990. [Pa125]

In other words, the state court and Petitioner recognized that it was up to the federal court to decide whether the Amended Judgment was a QDRO or was preempted by ERISA.

In July 1996, Robichaud forwarded the Amended Judgment and a proposed QDRO (Pa126-29 – another document which she had drafted herself) to the Plan. This proposed QDRO, like the Amended Judgment Petitioner had submitted to the state court, referred to "50% of Samaroo's vested pension benefits," which would have been determined as of the date he died, rather than half of the pension to which he might have been entitled as of the 1983 date on which the parties executed the PSA. And, once again, it did not provide that Petitioner was to be deemed a surviving spouse for purposes of receiving the Automatic Survivor Annuity.

On October 10, 1996, the MPP advised Robichaud that her proposed order could not qualify as a QDRO under either ERISA or the terms of the MPP, citing the same rationales it had in denying her initial claim some eight years earlier, and noting that it did not believe that an amended divorce judgment, even if intended to be retroactive 11 years back to the date of the initial Judgment, could create a QDRO, because her ex-husband's death had resulted in a final determination of the benefits he had been due from the Plan.

On June 2, 1997, once again before the district court – now seven years after its initial decision – Robichaud filed a motion for summary judgment or, in the alternative, to dismiss the MPP's Complaint for Declaratory Relief. On August 1, 1997, the MPP filed a cross-motion for summary judgment on its Complaint for Declaratory Relief. On April 21, 1998, the district court denied Robichaud's motion and granted MPP's cross-motion. Pa45-65. Robichaud filed a timely Notice of Appeal with the Third Circuit on May 13, 1998. On September 24, 1999, the Third Circuit affirmed the judgment of the district court. Pa1-22. Robichaud's petition for writ of certiorari to this Court followed on December 22, 1999.

REASONS FOR DENYING THE WRIT

Even if the factually complex and anomalous nature of the case were not sufficient to demonstrate the impropriety of granting certiorari to review the decision below, numerous other, purely legal considerations point to denying the Petition.

I. There Is No Conflict Between Courts of Appeal.

Petitioner argues that certiorari should be granted because there is a conflict between Courts of Appeal. However, her efforts to derive a conflict between the decision below and a "Seventh Circuit decision" (Petition ["P"] 13) border on the frivolous. There is no "Seventh Circuit decision in *Payne*." P28. There is only an unpublished district court opinion entitled *Payne v. GM/UAW Pension Plan*, No. 95-cv-73554DT, 1996 U.S. Dist. LEXIS 7966, 1996 WL 943424 (E.D. Mich. May 7, 1996), which the Third Circuit properly recognized had no precedential value precisely because it was an unpublished district court case. There is thus no need to "resolve the split in authority between the Third and Seventh Circuit," P8, because there is no such split.

In fact, the only circuit court decisions in the vicinity agree with the court below that to preserve the actuarial soundness of ERISA-covered defined benefit pension plans, it is appropriate to determine whether a state court DRO qualifies as a QDRO by reference to a date certain on which the plan participant's eligibility for benefits is locked in place. *See Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & Southwest Corp.*, 186 F.3d 681 (5th Cir. 1999) (following *Hopkins*). In *Hopkins and Rivers*, the date certain was the participant's retirement date; here, it was the participant's death. *Hopkins*, *Rivers* and the opinion below correctly concluded that a state court DRO which seeks to reach back into history – to a time before such a date certain – in order to retroactively change operative facts relating to benefit eligibility fails to comply with the mandate of 29 U.S.C. §1056(d)(3)(D), and is therefore not a QDRO.

II. The Issue Presented by Petitioner Is Highly Unlikely to Recur, and Will Definitely Not Recur in New Jersey.

Petitioner is equally far off the mark in asserting that the ruling below will affect a "great number of cases." P26. The ruling below involves an all-but-unique fact pattern: A *pro se* divorcing spouse (who happened to be a matrimonial attorney), through her own negligence, allowed a 1984 divorce judgment to remain unamended for over three years following the enactment of REA.

The passage of over 15 years since REA's effective date has given no hint that a substantial number of other would-be beneficiaries with pre-REA divorce judgments have been unable to convert their divorce judgments to QDROs because the plan-participant-former-spouse died before such an action could be taken. Nor does Petitioner point to any basis for the Court to believe that, during the years REA has been in effect, a "great number" of situations involving post-REA divorce judgments have arisen in which diligent attempts by a divorcing spouse to secure a QDRO have been thwarted by the death of the plan-participant-former-spouse.

Rather, in the 15 years since enactment of REA, only four instances have been uncovered involving litigation over a state court's attempted retroactive modification of a DRO after the death of a pension plan participant, where, as here, the modification would have required the Plan to pay "increased benefits" or a "type or form of benefit not otherwise provided by the plan" in violation of 29 U.S.C. §1056(d)(3)(D)(i) or (ii). They are two federal court cases – the present matter and *Payne* – and two state appellate court rulings that agree with the reasoning

and result below, *Roth v. Roth*, 506 N.W.2d 900 (Mich. Ct. App. 1993), and *Ross v. Ross*, 705 A.2d 784 (N.J. App. Div. 1998).

In *Roth*, like the case now before the Court, the parties' judgment of divorce conveyed an interest to the ex-wife in the pension benefits the husband would receive, but it required the husband and not the pension plan to pay the ex-wife, and payments were to be made only for so long as the husband received such benefits. It too, was silent as to survivorship rights. When the ex-husband died before drawing any pension benefits, his former wife seized the opportunity to try to retroactively amend the divorce decree to award herself the survivorship rights which otherwise would have lapsed. The Michigan court, applying state law and ERISA, refused to grant the ex-wife's petition to modify the divorce judgment so as to enter a posthumous QDRO.

In *Ross*, decided shortly after the New Jersey family court had entered its Order in this case and immediately prior to the decision rendered below by the district court, a divorce judgment which had never been reduced to a QDRO provided that a plan participant's ex-wife was to be deemed the surviving spouse for purposes of benefits under his various pension plans. Shortly after the divorce, the ex-husband remarried, and a short while later, he died. His pension plans all provided that the beneficiary of any survivorship payments would be his spouse unless the spouse had agreed otherwise in writing. After his death, his ex-wife sought to have her divorce judgment retroactively converted to a QDRO so that she could receive the survivorship payments. She argued that even though she was seeking this action after

her ex-husband's death, the court could grant the requested relief because "ERISA does not require the entry of QDROs prior to the time that a participant dies or remarries." 705 A.2d at 796. The state appellate court responded: "We disagree. . . . New Jersey's concepts of equity cannot be applied and a QDRO cannot be entered after the fact." *Id.* at 797.

No other case presenting a similar fact pattern has apparently reached the state or federal judiciary in all the years since QDROs became possible. Petitioner certainly does not cite any. With four known cases in 15 years, it can hardly be said that a "great number" of cases like Petitioner's have arisen.[4] Nor can it be said with any

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[4] Although the author of the dissent below apparently believed the majority ruling would necessarily have a broad impact, stating that the upshot of the ruling would be that "a state court's power to enter or modify a [QDRO] with respect to a participant's interest in a pension plan ends with the participant's death," and that she was "unable to conceive of circumstances in which, under the majority's reasoning, a meaningful alteration of a QDRO could be effected post-death," Pa15, the majority expressly disclaimed such a broad ruling. Pa14-15 n.1. The dissenter elsewhere acknowledged that what had been "expressly foreclosed" was only a "post-death modification of a QDRO which requires 'increased benefits.' " There are, of course, numerous circumstances in which a post-death QDRO would merely allocate a pension benefit so as not to implicate 29 U.S.C. §1056(d)(3)(D). For example, the district court opinion below identified an entire class of pension plans in pervasive use throughout the country – those utilizing individual accounts (such as 401k plans) – in which the entry of a QDRO after a plan participant's death would not require a plan to pay increased benefits. Pa52. In such plans, a fixed amount is held on behalf of the participant, and the only issue in entering a posthumous QDRO would be the identity of the

degree of certainty that the issue raised by Petitioner will affect anyone other than Petitioner herself. On the other hand, it can be said with certainty that because New Jersey family courts are now barred by *Ross* from issuing the type of retroactive amendment of a divorce judgment that was entered in the matter below, a similar dispute will never recur in New Jersey.

Nor is there any reason to credit Petitioner's assertion that federal courts will be subjected to "an explosion of domestic relations litigation." The normal course for a divorcing spouse who secures a DRO from a state court is to present it to the pension plan administrator, who is to make a determination whether it qualifies as a QDRO. If the plan administrator accepts the DRO as a QDRO, there will be no need for litigation. If it does not, then the dissatisfied ex-spouse has the option of filing a claim for benefits against the plan under 29 U.S.C. §1132(a)(1)(B). Such a suit may be brought in either state or federal court. 29 U.S.C. §1132(e)(1). While the defendant will have the option to remove the matter to federal court because the claim is based on a federal statute, there is no basis for Petitioner's opinion that litigants will overwhelmingly select a federal forum for these cases. *See, e.g., Roth v. Roth; Ross v. Ross.* And in any event, what would be presented would not be "domestic relations litigation" but ERISA-based claims for benefits, in which the key issue arises under federal law: Does the state court DRO qualify as a QDRO under the provisions of ERISA?

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proper beneficiary or beneficiaries and how the amount being held would be split, not whether benefits should be paid at all.

Another reason why Petitioner's "explosion of domestic relations litigation" in federal courts (P28) is unlikely is that in the limited number of cases in which a party might have delayed attempting to secure a QDRO for as long as Petitioner and is then precluded from doing so because of the death of the plan-participant-ex-spouse, that party will not be left without a remedy but will be able to proceed against his or her counsel for malpractice to recover the value of any lost benefits.[5] *See, e.g., Meyer v. Wagner*, 709 A.2d 784 (Mass. 1999) (authorizing malpractice claim against attorney for allegedly improperly preparing property settlement agreement and failing to initiate ancillary proceedings to secure assets); *Ziegelheim v. Apollo*, 607 A.2d 1298 (N.J. 1992) (permitting malpractice suit against matrimonial attorney whom client contended had been negligent in not negotiating and drafting a better property settlement on her behalf); *Williams v. Cooch & Taylor*, No. 92C-03-024, 1994 Del. Super. LEXIS 211 (Del. Super. Ct. May 11, 1994) (permitting malpractice claim arising from attorney's failure to perfect QDRO).

III. Ambiguities in the Record Below Render This an Inappropriate Vehicle for the Court to Address the Issue Put Forward by Petitioner.

A number of anomalies in the factual record from the state court proceeding render this case inappropriate for certiorari. As the state court judge noted, the draft of the

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[5] The uniqueness of Petitioner's situation is again highlighted here, for she represented herself and therefore could not claim against her malpractice policy.

Amended Judgment submitted to the court was prepared by Petitioner herself. *See* Pa115. Although she was urging the state court to enter an amendment of her Judgment as a retroactive *nunc pro tunc* order, she did not include such language in the draft she submitted and did not specify any particular retroactive date on which she wanted the order to be effective. *Id.*; Pa124-25. In explaining his reasons for entering the Amended Judgment, the state court judge articulated an "intent" to amend the original Judgment "as if it had been entered on January 1, 1985." Pa 115. However, for unstated reasons, he took no action to modify the language that Petitioner had submitted so that it would read as he "intended." Thus, the DRO at issue in this case bears a date of June 26, 1996, was filed on the state court docket on July 11, 1996, and nowhere states that it is to be deemed retroactive to any date, let alone January 1, 1985.[6]

Even if the Amended Judgment had specified that it *was* being entered *nunc pro tunc* to January 1, 1985, this would raise other issues as to the appropriateness of using this case as a vehicle for addressing the interplay between state court DROs which purport to be retroactive to a point in time prior to a plan participant's death and the requirements of 29 U.S.C. §1056(d)(3)(D). This is so because different jurisdictions have different rules as to

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[6] Under New Jersey law, the actual order entered by the state court, and not any purpose or "intent" stated by the court when announcing its opinion, controls and is the operative judicial "ruling." *Hesser v. Harleysville-Garden State Ins. Co.*, 670 A.2d 123, 126 (N.J. App. Div. 1996); *MacFadden v. MacFadden*, 139 A.2d 774, 776 (N.J. App. Div.), *certif. denied*, 141 A.2d 828 (N.J. 1958).

the circumstances under which *nunc pro tunc* orders may be entered. The general rule that *nunc pro tunc* orders may not affect a party's substantive rights but are to be confined to merely correcting an error committed by the court which entered the original order would foreclose entry of the type of substantive-right-affecting state court order issued here. *See* 56 Am. Jur. 2d, *Motions, Rules & Orders* §44 at 37-38:

> The function of an order *nunc pro tunc* is to record an order actually made, which, through some oversight or inadvertence, was never entered on the records of the court, or which was incorrectly entered. An order *nunc pro tunc* cannot do more than supply a record of something that was actually done at the time to which it is retroactive. . . . A *nunc pro tunc* amendment or correction of a court order is not proper to correct judicial errors or omissions or to change an order actually entered. If the court has omitted to make an order that it might or ought to have made at a particular term, it cannot make the order *nunc pro tunc* after the term or at a subsequent term.

See also Matthies v. Railroad Retirement Bd., 341 F.2d 243 (8th Cir. 1965) (*nunc pro tunc* order "may not be used for the purpose of wiping out a judgment previously entered by [the court] affecting the rights of a party thereto"); *Emmons v. Stillwell*, 156 A.2d 54, 56 (N.J. Law Div. 1959) (" '*[N]unc pro tunc*' is a phrase used to express that a thing is done at one time which ought to have been performed at another. . . . It can never be invoked to change a legal status."). In New Jersey, after *Ross*, this is now the rule, though the Michigan authorities appear split. *Compare Payne with Roth v. Roth.*

Furthermore, although one of the items of relief Petitioner seems to believe she secured in the Amended Judgment was her designation as Samaroo's "surviving spouse" for purposes of receiving the Automatic Survivor's Annuity provided under the MPP, *see* P6-7, neither the Amended Judgment entered by the state court, nor the proposed Domestic Relations Order drafted by Petitioner, in fact designates her as a "surviving spouse" for that purpose. All that is ordered is that Petitioner be awarded "rights of survivorship to 50% of [Samaroo's] vested pension benefits, and to be properly recognized as beneficiary and alternate payee of those rights." Pa125. This, like Petitioner's original Judgment, refers to a division of the monthly pension benefit payments Samaroo might have received if he had lived to collect them, and not to a survivor's annuity, which requires different language in a DRO. *See Hopkins*, 105 F.3d at 755 (distinguishing between DRO ordering division of monthly pension benefits and DRO ordering former spouse to be considered a "surviving spouse" for purposes of survivor's annuity); S. Rep. No. 575 (1984) at 20-21 ("If the participant dies before [attaining the earliest retirement age under the applicable pension plan], the alternate payee is entitled to benefits only if the qualified domestic relations order requires survivor benefits to be paid.")

These deficiencies in the Amended Judgment and the proposed DRO submitted to the MPP for qualification as a QDRO, both of which were drafted by Petitioner, further point to the inappropriateness of granting certiorari in this case.

IV. The Third Circuit Correctly Concluded that Petitioner's Amended Domestic Relations Order Is Not a QDRO.

The opinion below cut to the heart of the matter by focusing on whether Petitioner's Amended Judgment complies with 29 U.S.C. §1056(d)(3)(D)(ii). Regardless of the status of the Amended Judgment under state law, if the Amended Judgment requires the MPP to "provide increased benefits," then it is *not* a QDRO, is preempted by ERISA, *see id.* §1144(b)(7), and is unenforceable against the Plan. These key determinations are to be made under the federal law of ERISA and not pursuant to any state law or court order, as the New Jersey judge clearly recognized. In explaining his decision, he went to some length to make it clear that he was not purporting to rule on issues arising under ERISA, which were for the federal court to decide:

> . . . I am aware of the fact that it is the position of AT&T that under the plan at the time, because – at the time of the divorce, that he could not have elected to name Ms. Robichaud as a recipient of the survivor benefit. But this issue is for the federal court, not the state court to decide. [Pa121-22]
>
> * * *
>
> Of course, it will be for the federal court to decide whether or not there were any benefits to be left to Ms. Robichaud. [Pa122-23]
>
> * * *

> I conclude that a court of equity can enter such a judgment when it's in the interest of justice to do so. I conclude that I have the authority to do so. Of course, that does not decide the issue of what weight Judge Brown or his successor Judge in the United States District Court will give to my determination. Clearly by adding those words and seeking to at this time give effect to my decision now retroactive to January 1, 1985 when the Retirement Equity Act took effect will be for Judge Brown to determine. [Pa114-15]

Thus, the state court understood that in the procedural posture of this case, it was adjudicating only questions of state domestic relations law and that the federal court would determine the relevant question of federal law: Whether the state court's Amended Judgment was a QDRO.

The state court's observations above accurately reflect the language of ERISA as amended by REA. 29 U.S.C. §1144(a) provides that "[e]xcept as provided in subsection (b) of this section," ERISA "supersedes" (i.e., preempts) "any and all State laws. . . . " State laws include "decisions" of state courts, 29 U.S.C. §1144(a)(1), as is recognized in 29 U.S.C. §1144(b)(7) which was added by REA and provides that the preemption provision of subsection (a) is inapplicable only to *qualified* domestic relations orders. *See also Unum Life Ins. Co. v. Ward*, 526 U.S. 358, 119 S. Ct. 1380, 1386 n.1 (1999). Thus, the pertinent question – which the Petitioner and the dissent below fail to grasp – is not whether the courts below failed to give full faith and credit to the purported *nunc pro tunc* provision of the state court Order amending the 1984 Judgment, but whether the Order is a QDRO or not;

if not, it is preempted by ERISA. *See Boggs v. Boggs*, 520 U.S. 833, 852-54 (1997) (emphasizing primacy of ERISA's QDRO provisions over state community property law); *cf. Drye v. United States*, ___ U.S. ___, 120 S.Ct. 474, 479, 481 (1999) (holding that although state law applies to general effect of beneficiary's disclaimer of inheritance, "ultimate issue" as to federal taxability is controlled by federal, not state, law).

The courts below appropriately focused first on what the MPP was obligated to pay incident to Samaroo's participation in the Plan on the real date of his death in September 1987. At that time, *no one* had survivor annuity rights related to Samaroo's participation because Samaroo was not married and no QDRO existed designating Petitioner as his surviving spouse. Even Samaroo's right to receive pension payments had not yet accrued; as of his death, he had only an entitlement to receive Deferred Vested Pension payments at some later date, upon his retirement in accordance with the Plan. And, since no QDRO had been entered prior to Samaroo's death that assigned all or a portion of his vested-but-not-yet-payable pension benefits to an alternate payee, the MPP did not owe any pension payments to anyone with respect to Samaroo's participation in the Plan. Put simply, at the time of Samaroo's death, the Plan's obligations to him or to any possible beneficiary with respect to him were zero. Therefore, any order thereafter requiring *any* sum to be paid to anyone with respect to Samaroo necessarily would require the MPP to pay increased benefits and/or a type or form of benefit not otherwise provided by the Plan.

The Third Circuit majority explained why it is important to focus on the date of Samaroo's death as the point in time at which his entitlement to benefits from the Plan was determined. It analyzed how the nature of a defined benefit pension plan requires that its liabilities be ascertainable as of particular and identifiable dates. The other courts of appeals which have addressed an analogous issue – the Fourth Circuit in *Hopkins* and the Fifth in *Rivers* (which followed *Hopkins*) – have concluded similarly that because of defined benefit pension plans' characteristics, it is essential in enforcing ERISA that a plan's obligations to participants be fixed as of certain dates. In *Rivers* and *Hopkins*, the courts ruled that the date for locking in a plan's obligations to a participant and to any of his beneficiaries was the date that a participant retired and commenced receiving benefits. In this case, the Third Circuit correctly ruled that the latest ascertainable date for determining a participant's entitlements from the MPP was the date of his death. Utilizing such dates certain to determine a pension plan's liabilities is required because the necessary "actuarial calculations . . . would be rendered invalid if participants were allowed to change the operative facts retroactively." Pa10.

Yet such a retroactive re-writing of immutable history is the essence of what Petitioner has been trying for 11 years to persuade a court to do for her. The dissent below would open the door wide for state courts to do likewise. Before the state court judge, Petitioner invoked the doctrine of "unjust enrichment" to argue that it was not right to permit the MPP to "keep" the money that her deceased ex-husband could, during his lifetime, have arranged for her to receive. She told the state court that it should grant

the relief she sought because if she did not get the money, no one would, and it would be wrongly left in the MPP pension trust. While this obviously had a persuasive tug on the state court in this case and the district court in *Payne*, the Seventh Circuit explained in *Cummings v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 389 (7th Cir.), *cert. denied*, 479 U.S. 1008 (1986), why it is inappropriate in analyzing a defined benefit pension plan: "The doctrine of 'unjust enrichment' . . . does not make sense in this context of actuarial planning. A pension plan is not unjustly enriched where a pensioner dies early with no benefits payable to his survivor." *See also Ryan v. Federal Express Corp.*, 78 F.3d 123, 127-28 (3d Cir. 1996) (holding "unjust enrichment" doctrine not applicable to ERISA plan where plan provisions specify the result said to be "unjust").

As noted by the Third Circuit below, what happened here was not "unjust enrichment," but the normal operation of a defined benefit pension plan. The fact that no benefits were payable to anyone with respect to Samaroo's participation in the MPP is a natural consequence of the insurance-policy-like nature of defined benefit pension plans. Some participants will die before they ever collect a dollar of their pension and associated benefits, while others will live much longer than average and collect more than might have been forecast. When Samaroo died without ever agreeing to convert his divorce Judgment from one requiring him to pay money to Petitioner if and when he received a pension, to a QDRO (which could have been fashioned to ensure payments directly to Petitioner regardless of whether Samaroo pre-deceased her), he and Petitioner simply

became part of the statistics upon which the Plan – and all defined benefit pension plans – must depend to continue to exist. By operation of fate and the terms of the Plan, neither Samaroo nor his ex-wife was entitled to collect anything from the Plan. The Amended Judgment, despite its ambiguities, purports to compel the Plan to pay something to Petitioner with respect to Samaroo's participation in the Plan. By so doing, as the Third Circuit correctly held, it requires the payment of increased benefits, is not a QDRO in light of 29 U.S.C. §1056(d)(3)(D)(ii), and is preempted by ERISA. The Third Circuit correctly applied the plain language of REA to hold that:

> A domestic decree that would have the effect of increasing the liability of the Plan over what has been provided in the Plan (read in light of federal law) is not a QDRO, no matter what the decree's status under state law. . . . [A] decree conferring survivor's benefits to Robichaud after those benefits have lapsed would provide increased benefits and therefore cannot be a QDRO. [Pa10]

CONCLUSION

The Third Circuit correctly applied ERISA to hold that Petitioner's state domestic relations order did not meet the requirements to qualify as a QDRO. There is no valid reason for this Court to exercise its jurisdiction, and therefore the petition for certiorari should be denied.

Respectfully submitted,

CHRISTOPHER H. MILLS
Counsel of Record
CATHERINE J. SMITH
COLLIER, JACOB & MILLS, P.C.
Attorneys for Respondent
580 Howard Avenue
Somerset, New Jersey 08873
732.560.7100

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In The

Supreme Court of the United States

LOUISE ROBICHAUD SAMAROO,

Petitioner,

v.

AT&T MANAGEMENT PENSION PLAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

LOUISE ROBICHAUD SAMAROO, ESQUIRE
4585 Route 27
Post Office Box 166
Kingston, NJ 08528
(609) 924-9699

Petitioner Pro Se

28pp

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STATEMENT OF THE CASE

AT&T's brief refers to certain correspondence between its representatives and the wife. This correspondence is included as a supplemental appendix to this brief (Supplemental Appendix at A-1-6). The wife encourages the court to review the correspondence as an indication of AT&T's attitude toward the wife through these proceedings.

ARGUMENT

I. AT&T'S BRIEF IN OPPOSITION FAILS TO ADDRESS THE CRUCIAL ISSUE IN THIS CASE.

AT&T agrees that "the focus of this case" is whether the New Jersey state court order requires it to provide the wife with "increased benefits (determined on the basis of actuarial value)." *See* Brief in Opposition at 4; 29 U.S.C. § 1056(d)(3)(D)(ii). The Third Circuit majority admitted that the state court order would not have provided the wife with increased benefits if it had been effective during the husband's lifetime. *AT&T Management Pension Plan v. Robichaud*, No. 98-5245, Appendix to Petition For Certiorari at A-12 (3d Cir. September 24, 1999) (hereinafter Third Circuit Majority Opinion). The entire point of the Third Circuit dissent, however, was that the state court order *was* effective during the husband's lifetime. The dispute over the effective date of the New Jersey order is the central issue in this case.

The New Jersey state court expressly stated that its order would be effective nunc pro tunc back to the date of the original divorce decree in 1984 (A-115), which was entered before the husband died in 1987. The Third Circuit dissent contended, and a district court in the Seventh Circuit has held, that under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts *must* accept and cannot question the nunc pro tunc nature of a state court order. *AT&T Management Pension Plan v. Robichaud*, No. 98-5245

at A-18 (3d Cir. September 24, 1999) (Mannsman, J., dissenting) at A-18 (hereinafter Third Circuit Dissenting Opinion); *Payne v. GM/UAW Pension Plan*, No. 95-CV-73554DT, 1996 WL 943424 (E.D. Mich. May 7, 1996) (A-130). Other federal courts have reached the same result in cases involving other types of nunc pro tunc state orders. *See Flitcroft v. Commissioner*, 328 F.2d 449 (9th Cir. 1964); *United States v. Hennen*, 300 F. Supp. 256 (D. Nev. 1952).

Against this background, the wife expected AT&T's Brief in Opposition to provide this Court with some authority holding that the federal court need not respect the nunc pro tunc nature of the state court order. *But AT&T's brief does not even discuss the issue*! Indeed, the Full Faith and Credit Act, 28 U.S.C. § 1738, is not even listed in the Table of Authorities section of AT&T's brief. Brief in Opposition at v.

AT&T's failure to address the crucial issue in this case shows in compelling fashion how weak its position is. The wife has cited considerable authority holding that federal courts must respect the nunc pro tunc nature of state court orders. *AT&T has been unable to find a single contrary case*. Like the Third Circuit majority, AT&T argues that ERISA preempts state law, but ERISA does not and cannot preempt federal Full Faith and Credit law. The majority below *admitted* that a state court order effective during the husband's lifetime would not have been preempted. The wife and the dissent have provided considerable authority holding under the Full Faith and Credit clause, a provision of federal and not state law, that the order here was effective during the husband's lifetime. AT&T and the majority have never provided a single contrary case; indeed, they have not even addressed the issue. A decision entered without any supporting authority, against the weight of substantial existing authority, is surely in error.

II. THE WIFE'S CONDUCT DURING THE STATE COURT PROCEEDINGS IS IRRELEVANT TO THIS CASE.

In the absence of authority addressing the central question at issue here, AT&T attempts to distract the Court by raising issues regarding the wife's conduct during the state court proceedings. These arguments are made in the wrong forum. If the wife slept on her rights, then AT&T's proper course of action was to argue in state court against a nunc pro tunc effective date, and to appeal any adverse decision. Instead of making its arguments in the proper forum, a state appellate court, AT&T is making an end run, raising issues of state domestic relations procedure in federal court. The Full Faith and Credit Act requires the federal courts to give full faith and credit to *all* state court orders, regardless of whether the underlying state court action was diligently prosecuted.

Not content with asking this court to consider issues of New Jersey domestic relations procedure, AT&T also asks this court to consider issues of substantive New Jersey domestic relations law. In particular, AT&T argues that the mistake made by the wife was not the sort of mistake for which the law should grant relief, particularly since the wife is a matrimonial attorney; and that the trial court's order actually contravenes the law of New Jersey. *Ross v. Ross*, 705 A.2d 784 (N.J. Super. Ct. App. Div. 1998). Once again, AT&T's position shows no understanding at all of the limited jurisdiction of federal courts over domestic relations issues. The state court held that the mistake made by the wife was the sort of error which could be retroactively corrected under the substantive domestic relations law of New Jersey. The proper forum for contrary argument is the appellate courts of New Jersey, not the United States Supreme Court.

The wife invites the Court to compare AT&T's Brief in Opposition with its trial brief to the New Jersey state court, filed on August 21, 1990 (Supplemental Appendix at A-7.) The Court will quickly see that the two documents make many of the same arguments. AT&T is clearly asking the federal courts to exercise appellate review over a New Jersey state court decision. The Court will also see that AT&T told that state court that its holding *"will extend beyond the parties to the divorce decree"* (Supplemental Appendix at A-10) (emphasis added) – a position directly contrary to the one taken in AT&T's Brief in Opposition.

While the wife's conduct during the state court proceedings is irrelevant, she submits that AT&T's description of that conduct is mistaken. The state court proceedings were admittedly lengthy, but AT&T provides no authority that the delay was attributable to the wife's conduct. The delay was instead caused by mistakes with the court system itself, mistakes which accumulated to the point where the state court actually apologized to the wife for the delay in the proceedings. The wife did not sleep on her rights in state court.

AT&T is also wrong in asserting that the trial court's order was improper under New Jersey state law. The issue raised here simply did not arise in *Ross*, where the state court order at issue was not entered nunc pro tunc. The nunc pro tunc status of the present order is the entire foundation for both the wife's argument and the Third Circuit dissent. Ample New Jersey law permits nunc pro tunc amendment of mistakes in divorce decrees. *Miller v. Miller*, 160 N.J. 408, 734 A.2d 752 (1999); *Fulton v. Fulton*, 204 N.J. Super. 544, 499 A.2d 542 (Ch. Div. 1985); *Atwater v. Baskerville*, 89 N.J. Eq. 121, 104 A. 310 (Ch. 1918), *aff'd*, 90 N.J. Eq. 275, 106 A. 369 (E. & A. 1919).

Finally, the wife takes exception to AT&T's continued references throughout this case to the amount of other benefits awarded to her and to her children. The wife has

neither requested nor received charity from AT&T; she seeks to enforce contract and judgment rights. The benefits already received by the wife are from life insurance, the cost of which was shared equally by the husband and the wife pursuant to their property settlement agreement (A-78 to A-79). The benefits received by the two dependent children were independent death benefits, which AT&T was required to pay under the terms of the husband's employment. The *pension survivor benefits* at issue here arise from the husband's employment with AT&T; they are payable to the wife under a final state court order, valid on its face, which AT&T failed to appeal in state court. Whether AT&T thinks the wife has received "enough" is not the point. The point is that AT&T must comply with the terms of final judgments entered against it in state court, and that it cannot seek federal appellate review of state domestic relations decisions.

III. THE THIRD CIRCUIT OPINION PRESENTS A SIGNIFICANT RISK OF INCREASED ATTEMPTS TO LITIGATE DOMESTIC RELATIONS ISSUES IN FEDERAL COURT.

It is ironic to see AT&T claiming that the decision below will not result in increased attempts to litigate domestic relations issues in federal court, for the great majority of AT&T's own Brief in Opposition actually argues questions of state domestic relations law. In a sense, by raising state domestic relations issues in a federal forum, AT&T has refuted its own argument.

AT&T further argues that the Third Circuit decision will not result in an explosion of litigation because there has been no great incidence of *prior* litigation raising these issues. This contention misses the point. The wife does not argue that there is excessive present litigation; she argues that there will be excessive *future* litigation if

the principles behind the Third Circuit majority opinion are permitted to remain intact.

The danger of excessive future litigation arises from the nature of the QDRO provisions of ERISA. When Congress gave the federal courts jurisdiction to determine whether an order is actually a QDRO, it necessarily involved the federal courts to some extent in domestic relations litigation. As long as the federal involvement is limited to questions of federal law, the effect on the workload of the federal courts is manageable.

If federal courts hearing QDRO cases are permitted to consider issues of state law, however, the case load of the federal courts will rapidly become unmanageable. The total volume of divorce cases heard in state court is undeniably substantial, and essentially every divorcing couple owns retirement benefits. The great majority of these benefits are regulated by ERISA. Thus, the total number of QDROs entered each year in state courts is immense. If the federal courts have jurisdiction to consider state law issues every time a state court divides retirement benefits, there is a very real danger that the federal courts will be overburdened with domestic relations cases.

The Third Circuit majority opinion is a major intrusion upon core issues of state domestic relations law. The New Jersey state court originally divided the retirement benefits accumulated by the husband in the course of his marriage to the wife. It was then faced with a motion to correct a mistake in its prior order. The motion raised legitimately debatable issues of state domestic relations law, which AT&T recognized by intervening and appearing to contest it. The state trial court accepted the wife's position. Then, instead of appealing the substantive domestic relations issues to a state appellate court, AT&T sought collateral review in federal court. It ignored, and continues to ignore, the Full Faith and Credit Act in its

entirety. The great majority of its argument is a contention that the state trial court erred in granting relief to the wife, on grounds that her mistake was too serious and her delay in proceeding was too unreasonable. By any standard, *these are attempts to litigate substantive domestic relations issues in federal court.*

The result of the Third Circuit's decision is to encourage this sort of end run to federal court. Plan administrators will stop appealing or even appearing in state court actions, and they will instead argue in federal court that the state court judgment is substantively wrong. They will cite the Third Circuit's decision in this case as authority holding that the Full Faith and Credit Act does not bar their argument. (To the extent that the majority failed to expressly address full faith and credit, full faith and credit was clearly and directly addressed by the dissent, and future courts will reasonably assume that the majority intended to reject the dissent's argument.) The result will be that many more federal courts will confront exactly the same sort of brief which AT&T has presented to this Court: an attempt to raise state domestic relations law issues in a federal forum.

Contrary to AT&T's argument, the wife does not contend that there will be a specific explosion of attempts to divide survivor benefits after one spouse's death. The issue raised here is not by any means insignificant; it has arisen in one form or another in the Third, Fourth, Fifth and Seventh Circuits.[1] For the reasons previously highlighted by the wife, see Petition For Certiorari at 27, QDROs are difficult and complex documents even for the

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[1] In addition to this case (the Third Circuit) and *Payne* (the Seventh Circuit), see *Hopkins v. AT&T Global Information Solutions*, 105 F.3d 153 (4th Cir. 1997); *Rivers v. Central & South West Corp.*, 186 F.3d 681 (5th Cir. 1999). The results of the cases are divided: if this case had arisen in the Eastern District of Michigan, the wife would have prevailed.

experienced drafter, and the original draft frequently requires one or more revisions. Revision is needed not only because of the inherent difficulty of drafting QDROs, but also because many plan administrators (such as AT&T in this case) are either uncooperative or hostile when a QDRO is requested. The QDRO provisions of ERISA, of course, cover the great majority of all retirement benefit programs operating in this country. As a result, if the retirement benefits are to be *effectively* divided upon divorce, as Congress clearly intended, it is particularly important that federal courts defer to state law permitting the correction of mistakes.[2] Such deference is essential not only in cases involving death benefits, but in cases involving all types of retirement benefits, because QDROs are so difficult to draft correctly on the first attempt. The need for retroactive entry and modification of QDROs is an important policy factor supporting the wife's position.

The wife raises instead the broader issue of whether federal courts hearing QDRO issues of all sorts will be permitted to second-guess state courts on issues of state domestic relations law, thereby effectively tying the hands of state family law judges. If such second-guessing is permitted, the plan administrators will frequently do exactly what AT&T has done here: use the federal courts as a substitute for raising state law issues in state trial and appellate courts. This practice is particularly likely because federal courts normally apply stricter procedural and substantive rules than the uniquely equitable rules which often prevail under the law of domestic relations. If the federal courts become involved in even a fraction of the substantive domestic relations litigation occurring in

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[2] The ability to correct errors is likewise fundamental if retirement benefits are to be effectively used to enforce alimony and child support judgments, another important purpose of QDROs.

state court, there is a real and substantial danger that the resources of the federal courts will be unduly strained. This danger exists not only in cases dividing survivor benefits after one spouse has died, but also in any case where the qualification of a QDRO is a contested issue.

Indeed, as stated above, at an earlier stage of this case, on August 21, 1990, AT&T itself suggested that *"[t]his matter poses complex issues, and the impact of its resolution will extend beyond the parties to the divorce decree."* AT&T's letter brief to the state court at 3 (Supplemental Appendix at A-10) (emphasis added). This statement stands in stark contrast to AT&T's present position that the Third Circuit's decision will affect hardly anyone.[3]

The Seventh Circuit has recognized the dangers of widespread federal court review of state decisions dividing retirement benefits:

> Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second-guessing state judges' decisions would be repellent. *Unsuccessful litigants would refile their briefs from the state litigation with pension administrators, in the hope that lightning may strike as laymen review the work of judges.* Far better to let the states' appellate courts take care of legal errors by trial judges.

Blue v. UAL Corp., 160 F.3d 383, 386 (7th Cir. 1998) (emphasis added).

To prevent the danger posed by federal courts hearing substantive domestic relations issues, this court should insist that federal courts hearing QDRO issues adhere strictly to the requirements of the Full Faith and Credit Act. In particular, the federal courts should be required to give final state court orders exactly the same

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[3] Indeed, given the number of persons employed by AT&T throughout the United States, this case will almost necessarily have a widespread nationwide effect.

effect they have in state court, on all state law issues. Preclusive effect must be given not only on substantive issues, but also on procedural issues such as the effective date of the order.

If the Third Circuit majority had shown proper deference to the New Jersey order, it would have agreed with the dissent's position. All parties agree that the state court could have entered, during the husband's lifetime, an order dividing his survivor benefits. Under the state law of New Jersey, because the order dividing the survivor benefits was rendered nunc pro tunc, the order at issue here effectively *was* entered during the husband's lifetime. The Full Faith and Credit Act requires that the federal courts defer to, and not question, the nunc pro tunc nature of the New Jersey state court order. Because that order became effective before the husband died, enforcement of the state court order is not barred by ERISA.

CONCLUSION

For the reasons stated above, the wife respectfully requests that the Court grant her Petition for Certiorari.

Respectfully submitted,

LOUISE ROBICHAUD SAMAROO, ESQUIRE
4585 Route 27
Post Office Box 166
Kingston, NJ 08528
(609) 924-9699

Petitioner Pro Se

ASA
An AT&T Company

[Addresses Omitted In Printing]

October 10, 1996

Ms. Lousie M. Robichaud, Esq.
Attorney At Law
4585 Route 27
CN 166
Kingston, NJ 08528

Re: Louise Robichaud-Samaroo
Winston R. Samaroo (Deceased)
Estate of Winston R. Samaroo

Dear Ms. Robichaud:

AT&T Corp. is in receipt of your recent correspondence which included a proposed domestic relations order ("Proposed Order") in the matter of *Louise Robichaud Samaroo v. Winston R. Samaroo v. Estate of Winston R. Samaroo (Third Party Defendant)*. Superior Court of New Jersey, Chancery Division, Family Part, Somerset County, Docket No. FM-18-000454-96. The Proposed Order cannot qualify as a qualified domestic relations order ("QDRO") as that term is defined under the Employees Retirement Income Security Act of 1974, as amended ("ERISA") and under the terms of the AT&T Management Pension Plan ("AT&TMPP") for the following reasons.

It is our understanding that the intent of the Proposed Order is to provide you with a portion of a survivor annuity benefit from Winston R. Samaroo's vested pension benefit. As you know, at the time of his death, Mr. Samaroo was a vested participant in the AT&TMPP. However, at the time of his death, Mr. Samaroo was not

married to you due to a divorce judgment that was finalized on October 25, 1984. Under the terms of the AT&TMPP, no benefits are payable upon the death of a vested plan participant unless such participant is survived by a lawful spouse. Since you were not married to Mr. Samaroo at the time of his death, under ERISA and the terms of the AT&TMPP, you are not entitled to a survivor annuity benefit from the AT&TMPP.

The qualified domestic relations order ("QDRO") rules under ERISA allow a surviving former spouse to be treated as the surviving spouse for purposes of survivor annuity benefit entitlement to the extent provided in a QDRO. ERISA Section 206(d)(3)(F). At the time of Mr. Samaroo's death you were not his surviving spouse nor were you designated as his surviving spouse prior to his death under the terms of a domestic relations order that was qualified by AT&T Corp. prior to his death. Since under the provisions of the AT&TMPP you were not a surviving spouse of Mr. Samaroo at the time of his death, you are not entitled to a survivor annuity benefit under a QDRO and under the terms of the AT&TMPP. In addition, one of the requirements for a QDRO is that a domestic relations order may not require a "plan to provide any type or form of benefits, or any option not otherwise provided under the plan." ERISA Section 206(d)(3)(D)(i). You were not entitled to a survivor annuity benefit under the AT&TMPP as of the date of Mr. Samaroo's death, or at anytime during the ensuing nine years. Since the Proposed Order requires the AT&TMPP to provide a benefit that is "not otherwise provided under the plan", it cannot be a QDRO. Moreover, since Mr. Samaroo is deceased, there is no participant remaining with respect to whom

the existence of an alternate payee's right to a survivor annuity benefit could be created or recognized. ERISA Section 206(d)(3)(B)(i)(I).

If you should have any questions, I may be reached at the address in this letter, Room 6B12 or on 908 271-2668.

Sincerely,

/s/ Ann-Marie Black
Ann-Marie Black
Counselor
Domestic Relations Matters

(LOGO) **AT&T**

[Addresses Omitted In Printing]

October 27, 1988

Louise M. Robichaud, Esquire
50 Main Street
P.O. Box 166
Kingston, NJ 08528

Dear Ms. Robichard:

This will supplement my letter to you of June 23, 1988.

Please be advised that the Final Judgment of Divorce which you submitted with your May 16 letter has been reviewed by our legal counsel. It is their opinion that all entitlements concerning Mr. Samaroo's pension ceased with his death. You are not entitled to any survivor annuity under the terms of our pension plan, nor were you awarded such under the terms of the Judgment.

Sincerely,

/s/ Sallyanne S. Rossiter
Sallyanne S. Rossiter
Assistant Staff Manager
Domestic Relations Matters

cc: Cheryl Kramer

ACTUARIAL
SCIENCES
ASSOCIATES INC. (LOGO) **AT&T**

[Names And Addresses Omitted In Printing]

December 12, 1988

Louise M. Robichaud, Esq.
50 Main Street
P.O. Box 166
Kingston, NJ 08528

Dear Ms. Robichaud:

As Ms. Sallyanne Rossiter and Joe Sabounghi, Esq. have previously indicated, the provisions of the Final Judgement of Divorce do not entitle you to receive any survivor benefits under the AT&T Management Pension Plan. You are correct, as stated in your letter of November 3, 1988, that a Plan Administrator may (but is not required to) accept pre-REA orders, even though they do not explicitly meet all the requirements for QDROs. However, your Order creates a right only to a portion of your ex-husband's pension benefits, payable at his retirement. There is absolutely no indication in the Order of any right to survivor benefits.

ERISA Section 206(d)(3)(D)(ii) provides that one of the requirements of a QDRO is that it "does not require a plan to provide increased benefits (determined on the basis of actuarial value)." Providing a survivor benefit, when none is even hinted at in the Order, would require the Plan to provide increased benefits. Further, an amended order, granted ex-parte, could not qualify because there is no Participant remaining with respect to

whom the existence of an alternate payee's right to a survivor benefit could be created or recognized (ERISA Section 206(d)(3)(B)(i)(I)). All rights relating to and arising from Mr. Samaroo's participation in the Plan expired upon his death.

Because you are neither a Participant nor Beneficiary (nor can you possibly become such under the circumstances) under the AT&T Management Pension Plan, you do not have standing to bring a claim before the AT&T Employee Benefit Committee. We have enclosed the Summary Plan Description as an accommodation. We will be happy to provide you with copies of the Retirement Plan at your request at a charge of $0.10/page.

If you have any questions, please do not hesitate to call.

Sincerely,

/s/ Cheryl J. Kramer
Cheryl J. Kramer

CJK/av
Enclosure

cc: S. J. Macey
J. Sabounghi
S. Rossiter

COLLIER, JACOB & SWEET

A Professional Corporation

Counsellors at Law

Corporate Park III

580 Howard Avenue

Somerset, New Jersey 08873
(908) 560-7100

Telecopier (908) 560-0788

[Names Omitted In Printing]

August 21, 1990

VIA HAND DELIVERY

Hon. Phillip S. Carchman
Presiding Judge – Family Part
Superior Court of New Jersey
650 South Broad Street
Trenton, New Jersey 08650

Re: Samaroo v. Samaroo
Docket No. FM-07705-85

Dear Judge Carchman:

I am writing on behalf of the AT&T Management Pension Plan ("AT&T-MPP") in response to the August 19, 1990 letter of Louise M. Robichaud, Esq. and the Supplemental Certification of Joel N. Spivak, Esq., submitted in support of plaintiff's pending motion to amend her 1984 Divorce Judgment *nunc pro tunc* and to join AT&T-MPP as a party to this action. This motion is presently returnable before Your Honor on August 24, 1990. In these most recent submissions, plaintiff for the first

time challenges AT&T-MPP's standing to be heard in this court in opposition to her application, and asks this court to disregard AT&T-MPP's opposition brief.

Before addressing this "standing" issue, plaintiff's disingenuous tactics must be brought to the Court's attention. The Court should be aware that although plaintiff now contends AT&T-MPP is not a proper party to these proceedings, on July 23, 1990 plaintiff served a Request For Production of Documents upon AT&T-MPP in this action pursuant to Rule 4:18, which is applicable only to discovery requests by one party to another party. (A copy of plaintiff's July 23, 1990 cover letter and the document request are annexed hereto as Exhibit A). This request (which was telecopied to defense counsel on July 23) was timed to require AT&T-MPP to produce these documents in advance of the return date of this motion.[1] It is patently incredible that, after the extensive history of these proceedings (detailed in AT&T-MPP's initial brief), and after pursuing discovery from AT&T-MPP in this action incident to the pending motion, plaintiff has now done a complete about-face and is contending for the first time that AT&T-MPP has no interest in this litigation, and no right to be heard on this application.

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[1] As reflected in our correspondence to plaintiff annexed as Exhibit B, AT&T-MPP has in good faith compiled documents responsive to this document request, and stands ready to comply in a timely manner. However, we have requested a clarification of plaintiff's position(s) in light of her recent tactics.

It should also be noted that the motion presently before the court seeks to join AT&T-MPP as an indispensable party to this action pursuant to Rule 4:28. To our knowledge, this aspect of the motion has never been withdrawn, and therefore AT&T clearly has "standing" to be heard. However, if and to the extent plaintiff has now abandoned that request for relief, and assuming further she has the right to do so,[2] concurrent with this response we have filed a cross-motion to intervene in this application on behalf of AT&T-MPP. To the extent this application might be viewed as untimely, we ask the court to take into consideration that plaintiff's August 19, 1990 letter was AT&T-MPP's first notice of any objection to its participation (again, this motion was originally filed in April 1989), and plaintiff has been fully aware at all times of AT&T-MPP's intention to oppose the present application and to submit a brief in opposition thereto. Alternatively, if the Court determines this cross-motion is out of time, we would request a two-week adjournment of plaintiff's motion so that all issues may be considered.

I. AT&T-MPP Has "Standing" To Oppose the Pending Application.

Plaintiff and Mr. Spivak now assert that AT&T-MPP is "neither a necessary party . . . a valid party . . . or even an interested party" in this "action for divorce." (See

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[2] AT&T-MPP has a material interest in the outcome of this application (see discussion, *infra*), and as such is an indispensable party.

Spivak Certification, ¶ 3)[3]. Despite plaintiff's recent attempts to color it as such, this is not a simple matrimonial matter between plaintiff and her former husband to correct a minor mistake in a property settlement agreement, and AT&T-MPP is not merely an interloper with no interest in the outcome of this application. This matter poses complex issues, and the impact of its resolution will extend beyond the parties to the divorce decree.[4] The manifest purpose of the present application is to obtain a

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[3] The nature of Mr. Spivak's participation on this motion is not clear. Specifically, it is unclear whether he has submitted certifications simply as a fact witness in support of the plaintiff's application, or whether he is somehow purporting to represent the decedent Winston K. Samaroo in this matter, or to speak on his behalf. Mr. Spivak indicates only that he was the decedent's "former attorney and personal friend." Is he also Ms. Robichaud's "personal friend"? We note that Ms. Robichaud is an attorney specializing in matrimonial law. Did she recommend Mr. Spivak to her former husband to serve as his attorney in "friendly" divorce proceedings? We note this only because Ms. Robichaud and Mr. Spivak are so remarkably speaking with one voice in their efforts to achieve the desired result they apparently both desire. Furthermore, to the extent this application is predicated solely on plaintiff's self-serving statements and the speculations of her deceased husband's former attorney, both sources of which are open to question based upon credibility, AT&T-MPP maintains that even if plaintiff had some legal basis for the relief sought (which she does not), she has not met her burden of proof by "clear and convincing evidence," and therefore this application must be denied.

[4] This is readily apparent from the discussion in AT&T-MPP's August 3, 1990 letter brief submitted in opposition to this application, and is reflected in the extensive history of this litigation.

modified divorce judgment which plaintiff will then present to AT&T-MPP and, eventually, take to federal court and attempt have enforced against AT&T-MPP as a QDRO. As such, AT&T-MPP is materially interested in the outcome of the pending motion.

Because it is clear that if plaintiff is successful in obtaining an amended judgment she will attempt to obtain benefits from AT&T-MPP, it is clear that AT&T-MPP's interests – and the interests of pension plan participants and beneficiaries – will be affected as result of this court's determination. AT&T-MPP is therefore entitled to be heard (whether by virtue of plaintiff's motion to join it as a party or on its cross-motion to intervene) on this application so that its interests – and the interests of the plan participants and beneficiaries – are adequately represented. Certainly those interests are not protected at the present time (see footnote 3, *supra*).

II. Plaintiff Has Failed To Demonstrate Any Legal Basis For the Relief Sought.

As to the substance of plaintiff's legal arguments in support of her application, the bottom line remains that the relief plaintiff seeks is outside the scope of the relief which may validly be granted *nunc pro tunc* by this Court, and therefore plaintiff's reply papers to justify or support any other result.

Contrary to the unsupported legal argument at paragraph 4 of Mr. Spivak's Supplemental Certification, "oversight or inadvertence" by the parties in the drafting of the Separation Agreement is not the equivalent of an "oversight or inadvertence" by the court such that it may

be corrected by the court *nunc pro tunc*. The function of *nunc pro tunc* relief is to correct judicial errors or omissions resulting from some oversight or inadvertence by the court – so that the record may speak the truth. *Nunc pro tunc* relief is not available to change an order that was accurately rendered by the court but contained mistakes or omissions by the litigants. Simply stated, *nunc pro tunc* relief cannot be used to change an order so that it states what, in retrospect, a litigant wishes it had stated at the time it was entered.

Apparently recognizing that *nunc pro tunc* relief is not available in the circumstances, plaintiff in her reply brief attempts to characterize the relevant terms of the Separation Agreement as a "mutual mistake" and asks the court to "reform" the Agreement to conform to the parties' supposed "intent." Even putting aside that the original application was not for reformation of an instrument, the doctrine of mutual mistake is no more availing to plaintiff than is the limited *nunc pro tunc* authority of the Court.

It is true that a matrimonial agreement may be reformed when, through mutual mistake or the mistake of one party accompanied by the fraudulent knowledge of the other, it does not express the parties' true agreement. *Capanear v. Salzano*, 222 N.J. Super. 403, 407 (App. Div. 1988). However, "mistake," as a basis for the reformation of an instrument, exists only when a person, under some erroneous conviction of law or fact, does or omits to do something which, but for the erroneous conviction, he would not have done or omitted. *Toth v. Vazquez*, 8 N.J. Super. 289 (App. Div. 1950); *Savings Inv. & Trust Co. v. Connecticut Mut. Life Ins. Co.*, 17 N.J. Super. 50

(Ch. Div. 1952). Furthermore, as is clear from the quotations of case law contained in plaintiff's own reply brief, the "mistake" must be one which existed at the time the agreement was entered into. *See, e.g., St. Pious X House of Retreats v. Camden Diocese,* 88 N.J. 571, 579 (1982). Here, there was no mistake of law or mistake of fact at the time either the Separation Agreement or Final Judgment of Divorce was entered into -- for the plain and simple reason that at that time, the parties could not do what plaintiff now says they intended to do, *i.e.* provide for the alienation of Winston's pension benefits.

Therefore, the doctrine of mutual mistake is inapplicable for reasons similar to those which preclude *nunc pro tunc* relief. As detailed in AT&T-MPP's initial brief, the parties could not have done in 1983 or 1984 what plaintiff now says they intended to, because until 1985 – after the final judgment of divorce – there was no provision in ERISA for the type of alienation or assignment of pension benefits that plaintiff has been seeking. For this reason alone, plaintiff is not entitled to "reformation" of the divorce judgment on grounds of supposed "mistake."

It should further be noted, however, that while plaintiff now asserts that the parties intended to provide for survivor benefits at the time the Separation Agreement was entered into (but failed to do so due to "mistake"), the Certification she originally submitted in support of this application, dated April 12, 1989, indicated that the reason the 1983 Agreement was silent as to survivor benefits was that Winston's death "was a contingency no one entertained or anticipated at the time." (Robichaud Cert., at ¶ 6). If this "contingency" was not contemplated

at the time the Agreement was entered into, then certainly there was no "mistake in the preparation of the Agreement" and therefore no basis for reformation. It is one thing to say that the parties agreed to something which, as a result of "mistake," was inadvertently not included when the agreement was reduced to a writing. It is quite another to state that something was not included in the writing because no one thought of it at the time. In the latter situation, reformation is plainly unavailable. Reformation is not a remedy which is granted based merely upon speculation that a decedent "would" have wanted it that way." As set forth in AT&T-MPP's original brief, a court should not make a better contract for the parties than they have voluntarily made for themselves.

III. The Relief Sought by Plaintiff Is Barred By Rule 4:50-2.

It is now abundantly clear from the papers submitted on plaintiff's behalf that she seeks relief from the operation of the Final Judgment of Divorce solely because of claimed mistakes or omissions as to the terms of the 1983 Separation Agreement incorporated into the divorce judgment. While under Rule 4:50-1(a) a party may obtain relief from a final judgment based on mistake, inadvertence or excusable neglect, any application for such relief must be made within one year of the entry of judgment. R. 4:50-2. As to R. 4:50-2's applicability to the present case, "it is well settled that relief from the equitable distribution provisions of agreements which are incorporated in divorce judgments is subject to the standards of this rule." *Capanear v. Salzano*, 222 N.J. Super. 403, 408

(App. Div. 1988). Here, six years have passed from the entry of final judgment, and plaintiff's attempt to modify the divorce judgment is clearly barred by the one year time limitation of R. 4:50-2.

CONCLUSION

For all of the foregoing reasons, and those set forth in AT&T-MPP's initial brief, plaintiff's motion to amend the final judgment of divorce *nunc pro tunc* to October 24, 1984 should be denied.

Respectfully submitted,

COLLIER, JACOB & SWEET
A Professional Corporation
Attorneys for Defendant

By /s/ Christopher H. Mills
CHRISTOPHER H. MILLS
A Member of the Firm

RFB/lrh
cc: Louise M. Robichaud, Esq.
(via telecopy and regular mail)